

## Quis custodiet ipsos custodes (Who is guarding the guardians)? – Decision processes in the ICC's offences against the administration of justice

Article (Accepted Version)

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## A. Introduction

Offences against the administration or obstruction of justice have always been referred to as sensitive and complicated in nature.<sup>1</sup> It is submitted that these offences touch upon the core, heart or engine of the of the criminal justice procedure. Notwithstanding the prevalence of these offences in organized crime trials at domestic level, their occurrences is visiting upon door steps of international criminal justice on very unprecedented levels.<sup>2</sup> It is only logical that international criminal courts and tribunals have had no choice but to borrow a leaf from the domestic courts on how to curb the occurrence.<sup>3</sup> Among Courts and tribunals that are fast being overrun by such offences is the International Criminal Court (ICC). The ICC has been among the very few international institutions whose legal and procedural framework has aroused high expectations<sup>4</sup> and at times deeper but controversial suspicions.<sup>5</sup> This is likely to continue as the ICC forges ahead with the development of its jurisprudence. Indicted persons will always try to out-pace the Court as regards its integrity. It is only pertinent that the ICC stays one step ahead of criminals in its endeavor to bring impunity to an end and contribute to justice processes. From a policy-oriented jurisprudential perspectives this article discusses offences against the administration of justice provided for within mainly the Rome Statute's Article 70. Through relevant case-law of the ICC and lessons from the internationalized criminal tribunals, this work considers the ICC decision-making processes, expectation and challenges regards implementation of Article 70 and related provisions. It further touches on the related problem of subpoena testimonies. Finally the article considers policy alternatives that can minimize implementation challenges as regards offences against the administration of justice.

## B. Offences against the Administration of Justice

It is suggested that in order for international criminal justice to continue taking great strides on the international arena, it is supposed to ensure that administration of justice is implemented in accordance with the aspirations and expectations of the world community. It therefore has to

<sup>1</sup> G. Roberts, 'Article 70', Case Matrix Network (CMN), <http://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-6/>, 15 May, 2015.

<sup>2</sup> R. Cryer, 'Witness Tampering and International Criminal Tribunals', 27(1) *Leiden Journal of International Law* (2014), 192-193.

<sup>3</sup> *Ibid.*

<sup>4</sup> See generally, D. Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics*, New York, Oxford University Press, 2014.

<sup>5</sup> A.K.A Greenwalt, 'Justice Without Politics? Prosecutorial Discretion and the International Criminal Court', 39 *New York University Journal of International Law and Politics*, (2006-2007), 583-585.

be in tandem with a 'world public order of human dignity.'<sup>6</sup> This is where there is a postulation of fairness-oriented values, rationally-managed processes,<sup>7</sup> justice encompassing values and provision of greatest enjoyment of human values.<sup>8</sup> Courts have always had an inherent jurisdiction to ensure that the administration of justice is not an obstructed, prejudiced or absurd one.<sup>9</sup> This has been the case from as early as year 1600 when offences against administration of justice were considered on allegations of witness tampering or interference. A trial judge had made depositions admissible because the defendant had attempted to bribe or 'spirit away' two witnesses.<sup>10</sup> In another witness tampering case, it was held that if a witness testified and was later detained by the means or procurement of the prisoner, then such evidence could be used against the defendant.<sup>11</sup> From the foregoing, it is suggested that administration of justice as a core value of any progressive criminal justice system, should seek to approximate optimum order<sup>12</sup> and human dignity.<sup>13</sup> These are values and processes that any enlightened community cherishes.<sup>14</sup> Human dignity has been explained as aiming to provide a comprehensive framework of harnessing and revitalizing human capabilities in a rationally-organized free society as a means of achieving an enjoyment of human values.<sup>15</sup> In considering particular decisions as regards the administration of justice, it is submitted that the same should be appraised by looking at the degree of contribution to the attainment of integrity and a public order of human dignity.<sup>16</sup> This can as well be extended to both the road to Rome and the actual

<sup>6</sup> FS Tipson, 'The Lasswell-McDougal Enterprise: Toward a World Public Order of Human Dignity' 14 *Virginia Journal of International Law* (1973-1974) 536.

<sup>7</sup> M.McDougal, 'Perspectives for an International Law of Human Dignity' in McDougal & Associates 42 *Studies in World Public Order* New Haven, New Haven Press (1987) 987.

<sup>8</sup> M. McDougal, H. Lasswell & Chen 'Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry' 63 *American Journal of International Law* (1969) 237.

<sup>9</sup> M. Bohlander, 'International Criminal Tribunals and Their Power to Punish Contempt and False Testimony', 12 *Criminal Law Forum* (2001), 91-118; see also *Prosecutor v. Tadic*, IT-94-1, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujic, 31 January, 2000, paras 13-18, <http://www.icty.org/x/cases/tadic/acjug/en/vuj-aj000131e.pdf>, accessed on 19 September 2015 ; see also *Prosecutor v. Aleksovski*, IT-95-14/1-AR77, Judgment on Appeal by Nobile Against Finding of Contempt, May, 30, 2001, <http://www.icty.org/x/cases/aleksovski/acjug/en/nob-aj010530e.pdf> , accessed on 19 September 2015; *Prosecutor v. Kamuhanda*, ICTR-99-54A- A, Oral Decision (Rule 115 and Contempt of False Testimony), 19<sup>th</sup> May, 2005, <http://41.220.139.198/Portals/0/Case%5CEnglish%5CKamuhanda%5Cdecisions%5C190505.pdf>, accessed on 19 September 2015..

<sup>10</sup> *Harrison's Case*, 12 How. St. Tr. 833, 851 (HL 1692).

<sup>11</sup> *Lord Morley's Case*, 6 How. St. Tr. 769, 771 (H.L 1666).

<sup>12</sup> S. Wiessner, 'Law as a Means to a Public Order of Human Dignity: The Jurisprudence of Michael Reisman', 34 *Yale Journal of International Law* (2009), p.525.

<sup>13</sup> S. Wiessner, Michael Reisman, 'Human Dignity and Law', in Arsanjani, M.H, Cogan, J, Sloane, R, Wiessner, S. (Eds.) *Looking to the Future: Essays on International Law in Honour of W. Michael Reisman*, Martinus Nijhoff, Leiden, 2010, pp. 21-30.

<sup>14</sup> See generally, H.D, Lasswell & M.S McDougal *Jurisprudence for a Free Society: Studies in Law, Science, and Policy* (Volume 1 Leiden, Martinus Nijhoff Publishers, 1992).

<sup>15</sup> F.S, Timpson (n6) 536.

<sup>16</sup> W.M, Reisman, 'Theory About Law: Jurisprudence for a Free Society', 108 *Yale Law Journal*, (1999), p. 937

negations. The travaux préparatoires point to the fact that criminalising against offences or acts relating to administration of justice, was an express intention to protect the integrity of the future Court.<sup>17</sup> Further to this and pursuant to their national legal systems experiences, the negotiators at Rome found it pertinent to rework the proposals of the Preparatory Committee and come up with two main categories namely: (i) offences against the administration of justice, and (ii) Misconduct before the Court.<sup>18</sup> It has to be observed that despite the ICC existence for over a decade now, coupled with various scholarly work, jurisprudential development, continuous policy evaluation and assessment of legal structures and procedures, little or minimal conscious and systematic efforts have visited upon the clearly and consistent problems of the implementation of offences against the administration of justice. ICC actors on their varied stand-points as decision-makers<sup>19</sup> have had no proper jurisprudence to fall on during this unchartered course of justice.<sup>20</sup> Unless properly developed, there is a likely risk of ending up with an inconsistent, unfair and unyielding process.

In the Statute of the ICC, adopted in Rome on 17<sup>th</sup> July, 1998, articles 70 and 71 provide as follows:

**Article 70 : Offences against the administration of justice**

1. *The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:*
  - (a) *Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;*
  - (b) *Presenting evidence that the party knows is false or forged;*

<sup>17</sup> 'Proposal Submitted by the United States on Offences against the Integrity of the Court' UN Doc. A/AC.249/WP41 (13 September 1996); 'Working Paper Submitted by Australia and the Netherlands' UN Doc. A/AC.249/L.2, pp. 26-27; see generally T. Gut, *Counsel Misconduct Before the International Criminal Court: Professional Responsibility in International Criminal Defence* (Oxford, Hart Publishing, 2012).

<sup>18</sup> W. Schabas *The International Criminal Court: A Commentary on the Rome Statute* (Oxford, Oxford University Press, 2012), p. 854; 'Report of the Working Group on Procedural Matters,' UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.7; Articles 70 and 71 of the Rome Statute of the International Criminal Court; Rules 169 -172 of the Rules of Procedure and Evidence (ICC RPE).

<sup>19</sup> Investigators, prosecutors, defence and judges.

<sup>20</sup> It is only recently that Offences against the Administration of Justice have started taking shape within the ICC. With increasing indictments for offences within the Rome Statute, such offences are likely to be on the increase. No trial has ever been held in this regard and so far there are only indictments as follows: *The Prosecutor –v- Jean Pierre Bemba Gombo*, Aime Kilolo Musamba, Jean-Jacques Mangenda, Kabongo, Fidele Babala Wandu and Narcisse Aido, ICC-01/05-01/13, Decision Pursuant to Articles 61(7)(a) and (b) of the Rome Statute, 11 November 2014; *Prosecutor –v- Walter Osapiri Barasa* ICC-01/09-01/13-1-Red2, Warrant of Arrest for Walter Osapiri Barasa, 2 August 2013; *Prosecutor –v- Paul Gicheru & Philip Kipkoech Bett*, ICC-01/09-01/15 Public Redacted Version Decision on the Prosecution's Application under Article 58(1) of the Rome Statute, 10 September 2015.

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- (c) *Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;*
  - (d) *Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;*
  - (e) *Retaliating against an official of the Court on account of duties performed by that or another official;*
  - (f) *Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.*
2. *The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.*
3. *In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.*
4. (a) *Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;*
- (b) *Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.*

From the foregoing, it can be observed that the ICC Statute vests judges with the primary authority to police or impose criminal penalties<sup>21</sup> for any conduct that may harm the integrity of trial proceedings.<sup>22</sup> Such policing of misconduct has even extended to orders for preventive

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<sup>21</sup> Boas, G, Bischoff, J.L., Reid, N.L., (2011) *International Criminal Procedure: International Criminal Law Practitioner Library*, Cambridge, CUP, pp. 294-295

<sup>22</sup> Guariglia, F, & Rogier, E., (2015) *The Selection of Situations and Cases by the OTP of the ICC*, in Stahn, C, (Ed.) *The Law and Practice of the International Criminal Court*, Oxford, OUP, pp.388-389.

measures for the OTP to implement so as to curb misconduct recurring in future.<sup>23</sup> Boas and others have described the ICC legal framework governing such authority as an ‘excellent illustration of complex rule-making product coupled with detailed and ostensibly exhaustive provisions.’<sup>24</sup> It can as well be noted that Article 70(1) does not cover circumstances where a witness testifies without taking an oath or making a declaration.<sup>25</sup> This is only used in exceptional circumstances because there is need for a witness to respect and own the evidence he or she avers in the Courtroom. He or she is bound to state the facts or the truth on the events seized by such a trial. It is submitted that the evidential burden of proof requires that the testimonial process preserves the integrity of such a trial by pointing to truthfulness and probative value of such a case. Further, for better prosecution of the offence herein, it is suggested that investigations should consider whether such a witness had been warned of consequences of giving false testimony. Subject to the nature of the prosecution processes for such offences, Schabas has argued that there may be situations where it would be inappropriate for the prosecution to handle the case. This is especially so where an official from the OTP is allegedly involved.<sup>26</sup> There is no process provided within the Rome Statute or the ICC RPE for this situation. It is suggested that despite the silence of the statute, possibly Schabas scenario emanates from the long held maxim for serving human good or natural justice, namely, *nemo iudex in causa sua*.<sup>27</sup> Trends from predecessor tribunals such as the ICTY having been visited upon by the same circumstances have had to innovatively execute an *amicus curiae* as an *ad hoc* and independent investigator and prosecutor to see the process through.<sup>28</sup> A similar approach has been adopted by the ICC. The practice emanating from the Chambers of the ICC points to the overall responsibility to investigate and prosecute such offences falling within the ambit and purview of the OTP.<sup>29</sup> In the *Lubanga Case*, the Chamber was asking for the views of the parties and participants on the relationship between Article 70 and Rule 165 of the RPE; and whether the Prosecution alone may initiate and conduct investigations or whether scenarios

<sup>23</sup> *Prosecutor –v- Uhuru Muigai Kenyatta*, Situation in the Republic of Kenya, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, ICC-01/09-02/11-729, TC V, ICC, 26 April, 2013, paras 89-90, <https://www.icc-cpi.int/iccdocs/doc/doc1585619.pdf>, accessed on 02 April 2016.

<sup>24</sup> Boas, G, *et. al*, *Op. Cit*, p.295

<sup>25</sup> Rule 66(2) of the ICC RPE.

<sup>26</sup> Schabas (n 18) 857.

<sup>27</sup> No man should be judge in his own cause; *see also* A. Vermeule, ‘Contra Nemo Iudex in Sua Causa: The Limits of Impartiality’ (2012) 22 *Yale Law Journal* 384.

<sup>28</sup> *Prosecutor –v- Brdanin* (IT-99-36-R77), Order Instigating Proceedings Against Milka Maglov, 8 May, 2003, [http://icty.org/x/file/Legal%20Library/jud\\_supplement/supp48-e/brdjanin.htm](http://icty.org/x/file/Legal%20Library/jud_supplement/supp48-e/brdjanin.htm), accessed on 18 September 2015; Rule 77(C)(ii) of ICTY RPE.

<sup>29</sup> *Prosecutor –v- Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06, Decision of 14 March 2012, para 483, <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>, accessed on 18 September 2015.

described in Article 70(1) of the Statute should be within the investigative mandate of other investigators such as the Registry.<sup>30</sup> The request had arisen from an inquiry by the VWU regarding an issue of whether upon their testimony, defence witnesses had been subjected to pressure or direct or indirect threats by a person recognised as a victim in the proceedings.<sup>31</sup> In their submissions, the prosecution observed that from among the organs of the Court set out in Part V of the Statute, the general power to investigate is bestowed expressly and only upon the Prosecution.<sup>32</sup> Neither the Statute nor the Rules confer any concurrent investigative or judicial functions elsewhere within the Court, and in particular upon the Registry.<sup>33</sup> It has to be highlighted, that the defence has argued that when the prosecution has a conflict of interest, the Trial Chamber can ask the Registrar to appoint an amicus curiae to conduct the prosecution.<sup>34</sup> That notwithstanding, it is the exclusive discretion of the Prosecutor to investigate persons for potential violations. As opposed to the trend processes in the predecessor tribunals, the OTP interpretation and policy formulation has extended this interpretation to the effect that the Prosecutor cannot be ordered or seek instructions to conduct such investigations.<sup>35</sup> Pursuant to Article 42(1) of the Statute, the Prosecutor runs an independent and separate organ of the Court responsible for conducting investigations and prosecutions. Further to this, initiation of an investigation,<sup>36</sup> duties and powers of the Prosecutor with respect to investigations,<sup>37</sup> and the rights of persons during an investigation<sup>38</sup> confer investigative powers on the Prosecutor while deriving the base of power from the jurisdiction of the Court.<sup>39</sup> It is the Prosecutor's perspective that OTP has highly competent officers as the law requires,<sup>40</sup> extensive practical experience in prosecution and trial,<sup>41</sup> legally mandated to appoint qualified staff as investigators,<sup>42</sup> resources

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<sup>30</sup> *Ibid*

<sup>31</sup> *Ibid*

<sup>32</sup> *Prosecutor –v- Thomas Lubanga Dyilo*, Prosecution's Observations on Article 70 of the Rome Statute, ICC-01/04-01/06, 1<sup>st</sup> April, 2011, paras 1-2, <https://www.icc-cpi.int/iccdocs/doc/doc1050370.pdf>, accessed on 1 April 2016.

<sup>33</sup> *Ibid*, paras 1-2

<sup>34</sup> *Observations de la Défense sur la mise en oeuvre de l'Article 70, Lubanga*, Situation in the Democratic Republic of Congo, ICC-01/04-01/06-2715, Defence of Thomas Lubanga Dyilo, 1 April 2011, <https://www.icc-cpi.int/iccdocs/doc/doc1462060.pdf>, accessed on 02 April 2016.

<sup>35</sup> *Prosecutor –v- Thomas Lubanga Dyilo*, Prosecution Response to “*Requête de la Défense de M. Lubanga aux fins de communication d’éléments de preuve recueillis par le Procureur dans le cadre des enquêtes conduites en vertu de l’Article 70*” ICC-01/04-01/06 (Appeals Chamber), Submission of 25 March 2014, <http://www.icc-cpi.int/iccdocs/doc/doc1753007.pdf>, para 6, accessed on 18 September 2015.

<sup>36</sup> Article 53 of the Rome Statute

<sup>37</sup> Article 54 of the Rome Statute

<sup>38</sup> Article 55 of the Rome Statute

<sup>39</sup> *Lubanga Case*, Prosecutor's Observations, *Op. Cit.*, paras 2-3.

<sup>40</sup> Article 42(2) of the Rome Statute

<sup>41</sup> Article 43(3) of the Rome Statute

<sup>42</sup> Article 44(1) of the Rome Statute

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7 and expertise to investigate offences within Court's jurisdiction.<sup>43</sup> The initiation of  
8 investigations can be on the basis of information communicated by the Chamber or any reliable  
9 source.<sup>44</sup> It is argued that suggested that for purposes of serving human good, equality of arms  
10 and fairness, such discretion cannot be left unchecked nor lack of review thereof. The Chamber  
11 should consider a policy-oriented legal interpretation that mirrors the values the ICC stands  
12 for. There is need for an interpretation that would make it possible for the defence as an equal  
13 actor in the decision-making process to request the Chamber to order the prosecution to conduct  
14 such investigations. When it was alleged that intermediaries recruited by the OTP to help with  
15 investigations were involved in alleged misconduct regarding witness testimony in *Lubanga*  
16 *Dyilo Case*,<sup>45</sup> an independent consultant was retained to examine information in possession of  
17 the OTP. Factor processes for the independent consultant are confined to evidence already  
18 gathered by OTP and included: (i) evidence tendered as exhibits at trial including judgments,  
19 decisions; (ii) transcripts of witness testimony; (iii) decisions and judgments in the case; (iv)  
20 internal reports; (v) correspondence including emails, internal reports and memos. Upon  
21 finishing the examination, he had to advise the Prosecutor whether any investigations or  
22 prosecutions pursuant to Article 70 were warranted against the alleged offenders. Further, he  
23 had to recommend what further steps, if any, should be taken.<sup>46</sup> Actors who can promote such  
24 process require considerable skill and experience as senior prosecutor and defence attorney.<sup>47</sup>  
25 On the basis of the report and conclusions, assessment of the evidence, OTP is required to make  
26 final decision as whether to pursue further investigations and or prosecutions. In another case  
27 of *Prosecutor v. Jean Pierre Bemba Gombo. Aimé Kilolo Musamba, Narcisse Arido, Jean-*  
28 *Jacques Mangenda Kabongo and Fidèle Babala Wandu*,<sup>48</sup> the prosecution sought the issuance  
29 of a warrant of arrest for the five for their alleged participation in several offences against the  
30 administration of justice. They were accused of allegedly and knowingly ordered, solicited or  
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43 “...its investigative Division, filled with trained investigator and attuned particularly to the needs of law  
44 enforcement, routinely deals with difficult investigations, including in the filed, and is sensitive to and experienced  
45 in handling and protecting confidential information, witness security and evidence,” Lubanga Case, Prosecution's  
46 Observations, para 5.

47 <sup>44</sup> *Thomas Lubanga Dyilo Case* (n 26) para 483.

48 <sup>45</sup> *Thomas Lubanga Dyilo Case* (n 27) para 8.

49 <sup>46</sup> *Ibid*

50 <sup>47</sup> *Ibid*

51 <sup>48</sup> *Prosecutor v. Jean Pierre Bemba Gombo. Aimé Kilolo Musamba, Narcisse Arido, Jean-Jacques Mangenda*  
52 *Kabongo and Fidèle Babala Wandu*, Warrant of arrest for Jean-Pierre BEMBA GOMBO, Aimé KILOLO  
53 *MUSAMBA, Jean-Jacques MANGENDA KABONGO, Fidèle BABALA WANDU and Narcisse ARIDO*, ICC-  
01/05-01/13-1-Red2-tENG 05-12-2013 1/16 RH PT, 20 November, 2013, <https://www.icc-cpi.int/iccdocs/doc/doc1694691.pdf>, last accessed on 16 April, 2016.



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7 induced witnesses to present false or forged evidence,<sup>49</sup> and corruptly influenced witnesses.<sup>50</sup>  
8 It was held that the investigations were within the meaning of Article 70 of the Statute and  
9 Rule 165 of the RPE relating to the then ongoing case of Prosecutor –v- Jean-Pierre Bemba  
10 Gombo.<sup>51</sup> It has to be noted that the ICC tasked an independent counsel to inter alia, review  
11 logs of telephone calls. The mandate and modus operandi for the independent counsel derived  
12 from status conferences.<sup>52</sup> By engaging an independent counsel, it is suggested that the ICC  
13 intended to advance the similar pattern pursued in *Lubanga Case*, namely development of a  
14 Court monitored investigative practice and jurisprudence as regards administration of justice  
15 offences. It is further suggested that where an appointment for such an independent counsel is  
16 unlawful or procedurally flawed, then the evidence resulting from activities carried out by such  
17 a person can be deemed illegal or inadmissible, in violation of the Statute’s Article 69(7) and  
18 recognised international human rights.<sup>53</sup>  
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25 Conduct covered by Article 71 also constitutes one of the offences defined in Article 70.<sup>54</sup> Thus  
26 the Court shall proceed in accordance with Articles 70 and Rules 162 to 169 of the ICC RPE.  
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#### 29 ***Article 71: Sanctions for misconduct before the Court***

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- 31 1. *The Court may sanction persons present before it who commit misconduct, including*  
32 *disruption of its proceedings or deliberate refusal to comply with its directions, by*  
33 *administrative measures other than imprisonment, such as temporary or permanent*  
34 *removal from the courtroom, a fine or other similar measures provided for in the Rules*  
35 *of Procedure and Evidence.*  
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41 <sup>49</sup> Articles 70(1)(b) –(c) and 25(3)(b) of the Rome Statute

42 <sup>50</sup> Articles 70(1)(c) and 25(3)(b) of the Rome Statute

43 <sup>51</sup> *Prosecutor –v- Jean Pierre Bemba Gombo*, ICC-01/05-01/08-3343, 21 March, 2016, [https://www.icc-](https://www.icc-cpi.int/iccdocs/doc/doc2226759.pdf)  
44 [cpi.int/iccdocs/doc/doc2226759.pdf](https://www.icc-cpi.int/iccdocs/doc/doc2226759.pdf), last accessed on 18 April 2016.

45 <sup>52</sup> Statute Conference on 30 August 2013, ICC-01/05-T-2-CONF-EXP-ENG; Statute Conference on 25  
46 September, 2013, ICC-01/05-T-3-CONF-EXP-ENG; Status Conference 10 October 2013, ICC-01/05-T-4-  
47 CONF-EXP-ENG; *Rapport intermediaire du conseil ad hoc* of 1 October 2013, ICC-01/05-59-CONF-EXP, with  
48 confidential exparte Annex A.

49 <sup>53</sup> There is need for sufficiency and probative value of evidence, Pre-Trial Chamber II, “Decision Pursuant to  
50 Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor Against Jean -Pierre Bemba Gombo”,  
51 15 June 2009, ICC-01/05-01/08-424, paras 41 and 42; Pre-Trial Chamber II, “Decision on Admissibility of  
52 Evidence and Other Procedural Matters”, 8 June 2014, ICC-01/04-02/06-308, para. 25; The Chamber is guidend  
53 to take great care in finding that a witness is or is not credible, Appeals Chamber, “Judgment on the appeal of the  
54 Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled ‘Decision on the  
55 confirmation of charges’”, 30 May 2012, ICC-01/04-01/10-514, para. 48.

56 <sup>54</sup> Rule 172 of the ICC RPE.

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2. *The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.*

Apart from the above provisions within the Rome Statute, the Court's Regulations provide for an extreme and broad worded discretionary authority to regulate non-compliance. This is a regulatory text that has no or little elaboration within the Rome Statute system. It states as follows:

*In the event of non-compliance by a participant with the provisions of any regulation, or with an order of a Chamber made thereunder, the Chamber may issue any order that is deemed necessary in the interests of justice.*<sup>55</sup>

It is trite from the provisions above that there is a comprehensive outline of the offences and regulation of misconduct within the ICC legal framework. What makes these provisions special is the fact that other international criminal tribunals such as the Special Court of Sierra Leone (SCSL), International Criminal Tribunal for former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), Special Tribunal for Lebanon (STL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) did not have offences against the administration of justice premised in their respective Statutes but rather Rules of Procedure and Evidence (RPE).<sup>56</sup> Further, they never had specific and wide ranging discretionary powers regulating non-compliance of orders.<sup>57</sup> It is suggested that possibly the negotiators at Rome intended to premise these offences within the statute and not the RPE as a way of demonstrating a serious paradigm shift from the challenges that had dogged the predecessor tribunals in protecting the integrity of the court process.<sup>58</sup> Further, it is suggested that clearly having the offences embossed within the statute as opposed to the RPE, was a signal to would be States Parties that the Rome Statute was an exceptional treaty that seriously wanted to be in control of the trial proceedings, processes and integrity as opposed to control by States Parties.<sup>59</sup> Depending on undesirable and inappropriate circumstances, the Court may not consult with

<sup>55</sup> ICC Regulation 29(1); see also, ICC Regulation 29(2): This provision is without prejudice to the inherent powers of the Chambers, [https://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations\\_of\\_the\\_Court\\_170604EN.pdf](https://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf), accessed on 31 March 2016.

<sup>56</sup> Roberts, G., *supra* note 1, para 589, mostly referred to by the term contempt of court proceedings.

<sup>57</sup> It will have to be seen how the Chambers will apply these powers under Regulation 29 (1) of the ICC Regulations.

<sup>58</sup> Ad hoc Tribunals had its judges use 'contempt of court' in effecting decision-making regarding administration of justice offences and processes. This was mostly through 'inherent powers or jurisdiction' of such institutions. Such inherent power to prosecute though set out in the RPE of the *ad hoc* tribunals decision-makers conceptualised it as self-executing and existing independently of the said RPE; W. Schabas (n 18) pp. 854-855; *Prosecutor –v- Brdanin* (IT-99-36-R77), Decision on Motion for Acquittal Pursuant to Rule 98 *bis*, paras 15-16.

<sup>59</sup> 'Report of the Working Group on Procedural Matters,' UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.7.

States Parties which may have (concurrent) jurisdiction over alleged offence.<sup>60</sup> Factor processes for such circumstances may include but not limited to risk for unduly leak of information, chances of an arrest for a suspected criminal being thwarted,<sup>61</sup> unlikely effective national prosecution, size and extent of organization of the alleged criminal effort, witness protection and general security situation with regard to persons associated with the proceedings.<sup>62</sup> It is suggested that in considering these factor processes, the evidential burden lays with the prosecution in averring such information as necessary to prove that there is likelihood of unduly leak of information and thwart of arrest. Decision-makers can consider this on case to case basis and not blanket application.

Turner<sup>63</sup> has observed that policy formulation and legal interpretation as regards safeguarding against administration of justice offences has gradually changed. Initially, it was a strict focus on prejudice to the defendant,<sup>64</sup> and ‘odious’<sup>65</sup> to the integrity of proceedings.<sup>66</sup> Thus the prejudice on the defendant is premised in the Chamber’s power to stay proceedings because of violations of an accused person’s fundamental human good or rights.<sup>67</sup> Categories for such

<sup>60</sup> *Walter Osapiri Barasa Case* (n 21), paras 1-3.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Paul Gicheru & Philip Kipkoech Bett Case*, para 7.

<sup>63</sup> Turner, J.I. (2015) Accountability of International Prosecutors, in Stahn, C (Ed) *The Law and Practice of the International Criminal Court*, Oxford, OUP, p.389.

<sup>64</sup> *Prosecutor –v- Thomas Lubanga Dyilo*, Decision on the Consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the status Conference on 10 June, 2008, ICC-01/04-01/06, 13 June, 2008, para 17, 64 & 75, <https://www.icc-cpi.int/iccdocs/doc/doc511249.PDF>, last accessed on 03 April 2016; In order for the Chamber to ensure that due process was adhered to until the withheld evidence was reviewed, decided to indefinitely release the accused, *Prosecutor –v- Thomas Lubanga Dyilo*, Decision on the release of Thomas Lubanga Dyilo, ICC-01/04-01/06-1418 02-07-2008 1/17 VW T, 2 July 2008, para 30, <https://www.icc-cpi.int/iccdocs/doc/doc522804.PDF>, last accessed on 03 April 2016; It has to be noted that the proceedings only resumed after the Appeals Chamber intervened and the information providers gave their consent to the Prosecution to proceed with the disclosure to the Chambers, *Prosecutor –v- Thomas Lubanga Dyilo*, Reasons for Oral Decision Lifting the stay of proceedings, ICC-01/04-01/06-1644 23-01-2009 1/30 RH T, 23 January, 2009, para 13, <https://www.icc-cpi.int/iccdocs/doc/doc622878.pdf>, last accessed on 3 April, 2016.

<sup>65</sup> *Prosecutor –v- Thomas Lubanga Dyilo*, Redacted Decision on the ‘Defence Application Seeking a Permanent Stay of the Proceedings’, Judgment of 7 March, 2011, ICC-01/04-01/06-2690-Red2 08-03-2011 1/92 FB T, para 212, <https://www.icc-cpi.int/iccdocs/doc/doc1036342.pdf>, last accessed on 03 April 2016.

<sup>66</sup> *Prosecutor –v- Thomas Lubanga Dyilo*, Judgment on the Appeal of the Prosecution against the Decision of the Trial Chamber I entitled ‘ Decision on the consequences of non-disclosure of the exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, AC, Judgment of 21 October, 2008, ICC-01/04-01/06-1486 21-10-2008 1/60 CB T OA13, paras 41 & 55, <https://www.icc-cpi.int/iccdocs/doc/doc578371.pdf>, last accessed on 3 April 2016; It has to be noted that the proceedings only resumed after the Appeals Chamber intervened and the information providers gave their consent to the Prosecution to proceed with the disclosure to the Chambers, *Prosecutor –v- Thomas Lubanga Dyilo*, Reasons for Oral Decision Lifting the stay of proceedings, ICC-01/04-01/06-1644 23-01-2009 1/30 RH T, 23 January, 2009, para 13, <https://www.icc-cpi.int/iccdocs/doc/doc622878.pdf>, last accessed on 3 April, 2016.

<sup>67</sup> *Prosecutor –v- Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute,

fundamental human goods comprise right to fair trial concept that is broadly perceived and applied, embracing the judicial process in its entirety.<sup>68</sup> It is suggested the entire judicial process includes administration of justice misconduct. That notwithstanding, a stay of proceedings is an extreme and drastic measure that should only be used as a last resort.<sup>69</sup> The administration of justice offences is now focused on the broader considerations of competing interests in determining appropriate remedies<sup>70</sup> for such conduct.<sup>71</sup> This is a balancing approach<sup>72</sup> to remedies that take into account the sensitivity of competing remedial interests of the trial. Thus as opposed to drastic orders, the ICC can resort to alternative measures to cure OTP's misconduct such as court-imposed sanctions and administrative sanctions. Court imposed sanctions can include a fine, warning or disqualification. Administrative sanctions comprise removal and disciplinary measures by the Assembly of States Parties (ASP),<sup>73</sup> investigations by an Independent Oversight Mechanism<sup>74</sup> and internal disciplinary proceedings pursuant to the code of professional conduct for counsel, especially the OTP.<sup>75</sup> The code of conduct has been criticized as flawed and ineffective self-regulation<sup>76</sup> that does not fully meet

ICC-01/04-01/06-772 14-12-2006 1/22 CB PT OA4, 14 December, 2006, paras 36-39, [http://www.legal-tools.org/uploads/tx\\_ltpdb/doc243774\\_16.pdf](http://www.legal-tools.org/uploads/tx_ltpdb/doc243774_16.pdf), last accessed on 03 April, 2016.

<sup>68</sup> *Prosecutor –v- Laurent Koudou Gbagbo*, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on Jurisdiction and Stay of the Proceedings, ICC-02/11-01/11-321 12-12-2012 1/40 NM PT OA2, 12 December, 2012, paras 100-102, [http://www.legal-tools.org/uploads/tx\\_ltpdb/2012-12--10-31\\_1526463\\_03.PDF](http://www.legal-tools.org/uploads/tx_ltpdb/2012-12--10-31_1526463_03.PDF), last accessed on 03 April 2016.

<sup>69</sup> *Prosecutor –v- Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", AC, ICC-01/04-01/06-2582 08-10-2010 1/27 T OA18, 8 October, 2010, para 60, <https://www.icc-cpi.int/iccdocs/doc/doc947768.pdf>, last accessed on 4 April 2016.

<sup>70</sup> *Prosecutor –v- Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red 01-12-2014 1/193 NM A5, AC, 1 December 2014, paras 158-159, <https://www.icc-cpi.int/iccdocs/doc/doc1876833.pdf>, last accessed on 03 April 2016.

<sup>71</sup> Chambers has evaluated evidence and its reliability, extent of damage and consequences on due process, *Prosecutor –v- Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842 14-03-2012 1/624 SL T, 14 March, 2012, paras 121-123, <https://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>, last accessed on 03 April 2016.

<sup>72</sup> Turner, J.T. (2012) Policing International Prosecutors, 45 *New York University Journal of International Law and Politics*, p.183

<sup>73</sup> Article 46 of the Rome Statute; Rule 24 and 175 of the ICC RPE; Regulations of the Court 120 & 121

<sup>74</sup> Article 112(4) of the Rome Statute; Establishment of an Independent Oversight Mechanism, ICC-ASP/8/Res.1, [https://www.icc-cpi.int/iccdocs/asp\\_docs/Publications/Compendium/Resolution-Establishment-IOM-ENG.pdf](https://www.icc-cpi.int/iccdocs/asp_docs/Publications/Compendium/Resolution-Establishment-IOM-ENG.pdf), last accessed on 4 April 2016; Coleman, M, Feltz, M, Oumopoulou, E, Mubiru, S, Rabatileva, Sayles, C, & Vikhre, A, (2011) *Assessing the role of the independent oversight mechanism in enhancing the efficiency and economy of the ICC*, Clinical Programme on Conflict, Human Rights and International Justice of the Utrecht Law Faculty, p.26, <http://www.iilj.org/newsandevents/documents/iomfinalpaperaspublishedinotpwebsite.pdf>, last accessed on 4 April 2016.

<sup>75</sup> *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, ICC-01/09-02/11-747 31-05-2013 1/13 RH T, 31 May 2013, para.10, <https://www.icc-cpi.int/iccdocs/doc/doc1599174.pdf>, last accessed on 4 April 2016.

<sup>76</sup> Pacewicz, L. (2013) Introductory Note to International Criminal Court Code of Conduct for the Office of the Prosecutor, 53(2) *International Legal Materials*, pp.397-412.

the current needs to balance the powers and faculties of the Prosecutor as regards fair trial principles, credibility of the Court and sound administration of justice.<sup>77</sup> Though this is the case, these remedies have been appraised as being in tandem with the postulation of fair trial rights of the accused person, less costly to other competing and legitimate goals of international criminal justice such as punishing international crimes, offering relief to victims and compiling a historical record.<sup>78</sup>

Article 70 is aimed at preserving the integrity of judicial proceedings before the Court and proscribing behaviours suitable for such integrity.<sup>79</sup> Accordingly, the main guiding element of the offences in article 70 is the intention or mens rea of the accused person. This hovers over three conflated and distinct offence categories, namely: (i) providing false testimony or presenting false evidence; (ii) Interference with witnesses; (iii) Offences by or against officials of the Court.<sup>80</sup> A witness can be tried for intentionally giving false information or otherwise withholding information that is true. It is a duty and obligation bestowed on a witness to aver the truth during court proceedings. The rationale behind it is the fact that such a person is under oath binding upon him or her to help the court come to a true and meaningful understanding of the matter before court.<sup>81</sup> As regards the offence of “presenting evidence that the party knows is false or forged”, pursuant to article 70(1)(b) of the Statute, it has been held that the reference to “evidence” in this provision has to be construed so as to include all types of evidence such as documents, material and tangible objects, as well as oral evidence.<sup>82</sup> Further, such evidence is deemed to be “presented” when it is introduced in the proceedings, thereby being made available to the parties, the participants and the Chamber.<sup>83</sup> The expression a “party”, only refers to those who have the right to present evidence to a chamber in the course of proceedings

<sup>77</sup> Oriolo, A. (2016) The ‘Inherent Power’ of Judges: An Ethical Yardstick to Assess Prosecutorial Conduct at the ICC, *International Criminal Law Review*, [10.1163/15718123-01602004](https://booksandjournals.brillonline.com/content/journals/10.1163/15718123-01602004), <http://booksandjournals.brillonline.com/content/journals/10.1163/15718123-01602004>, last accessed on 4 April 2016.

<sup>78</sup> Tuner, *Policing International Prosecutors* (n.66), p.183

<sup>79</sup> *Prosecutor –v- Walter Osapiri Barasa*, Warrant of Arrests, Under seal ex parte, only available to the Prosecutor and the Registrar, ICC-01/09-01/13-1-Red2 02-10-2013 2/20 NM PT, 2 August, 2013, para 20, <https://www.icc-cpi.int/iccdocs/doc/doc1650592.pdf>, last accessed on 15 April 2016.

<sup>80</sup> Roberts, *supra* note 1, para 589; ‘Proposals submitted by the United States on Offences Against the Integrity of the Court’ UN Doc. A/AC.249/WP.41.

<sup>81</sup> *Prosecutor v. Jean Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/13-749 11-11-2014 11/55 EO PT, (PT I) Decision of 11<sup>th</sup> November, 2014, para 28, <http://www.icc-cpi.int/iccdocs/doc/doc1857534.pdf>, 20 September, 2015.

<sup>82</sup> *Ibid*, para 29

<sup>83</sup> *Ibid*

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7 before the Court such as members of the Defence team and the accused.<sup>84</sup> In addition,  
8 accessorial liability under article 25(3) (b)-(d) of the Statute may be incurred by any third  
9 person who does not have such capacity.<sup>85</sup> This is applicable regardless of whether the Chief  
10 Prosecutor has proffered charges against an alleged direct perpetrator of the offence pursuant  
11 to article 25(3)(a) of the Statute.<sup>86</sup> It has also been held that all types of evidence<sup>87</sup> introduced  
12 in the proceedings, made available or presented to parties, actors or participants<sup>88</sup> to an ICC  
13 trial process. It has to be noted that only those involved in the decision-making process namely  
14 right to audience.<sup>89</sup> It is therefore submitted that this holding rules out NGOs as actors in as far  
15 as they are not presenting evidence before Court. Further, any such evidence that may have  
16 been adduced to investigators or intermediaries but has not been averred before the Chambers  
17 cannot be caught under this offence.  
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25 Article 70(1) (c) of the Statute proscribes any conduct that may have (or is expected by the  
26 perpetrator to have) an impact or influence on the testimony to be given by a witness, inducing  
27 the witness to falsely testify or withhold information before the Court.<sup>90</sup> Such relevant conduct  
28 should be aimed at ‘corruptly’ contaminating the witness’s testimony.<sup>91</sup> It was therefore argued  
29 that the offence of corruptly influencing a witness is constituted independently from whether  
30 the pursued impact or influence is inchoate or actually achieved and must therefore be  
31 understood as a conduct crime, not a result crime.<sup>92</sup> It has been held that it is possible to make  
32 payments within the domain of administrative reimbursements of expenses related to the  
33 conduct of defence investigations. However, such payments should be accompanied by specific  
34 and detailed explanations.<sup>93</sup> It is suggested that the impugned conduct should be that which  
35 taints the witness testimony and is independent of the goals pursued, whether such goals  
36 materialise or not. Further, in considering the offence, decision-makers should in their  
37 standpoints should consider that the offending act must be prompted by a corrupt motive.  
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45 <sup>84</sup> Ibid

46 <sup>85</sup> Ibid

47 <sup>86</sup> Ibid.

48 <sup>87</sup> Oral evidence, tangible or documentary.

49 <sup>88</sup> All those involved in the decision-making process such as The Chambers, OTP, Defence.

50 <sup>89</sup> *Bemba Gombo Case*, *supra* note 18, para 29.

51 <sup>90</sup> Ibid, para 30

52 <sup>91</sup> Ibid

53 <sup>92</sup> *Prosecutor –v- Paul Gicheru and Philip Kipkoech Bett, Decision on the “Prosecution’s Application under Article 58(1) of the Rome Statute”*, ICC-01/09-01/15-1-Red 10-09-2015 1/19 EK PT, para 19, <https://www.icc-cpi.int/iccdocs/doc/doc2056890.pdf>, last accessed on 13 April 2016.

54 <sup>93</sup> Ibid, paras 59-60.

Further, any legitimate doubts arising from the accused's conduct must be resolved in favour of the accused person.<sup>94</sup>

Witnesses that are alleged to have been corruptly influenced testify against the accused persons in the company of an ICC appointed lawyer. This lawyer is appointed pursuant to Rule 74 of the RPE to provide advice. Such advice is only limited to avoidance of self-incriminatory testimony.<sup>95</sup> For purposes of their protection and circumstances, such testimony may be either in closed session or through video-link from an undisclosed location.<sup>96</sup> A notification for such appointment of a lawyer is made by the ICC. For instance, Witness P-198 had a lawyer appointed from Kinshasa in DRC.<sup>97</sup> Other laws in line with the same process include article 68 of the Rome Statute, rule 21 of the RPE, regulations 23bis, 67 and 69 of the Regulations of the Court, regulation 123(1) of the Regulations of the Registry, and articles 5, 8 and 22(3) of the Code of Professional Conduct for counsel.

Notwithstanding the above, it is suggested that the question as to whether the payments are excessive or prohibitive in accordance with the ICC practice or the practice of international criminal tribunals can be determined by so many factors processes. Policy and legislative framework of the ICC is silent on the VWU playing an oversight role in making or determining payments to witnesses during defence or prosecution investigations.<sup>98</sup> From this, it can be derived that the VWU is not conversant with how much money the defence or the prosecution pays witnesses during investigations. However, it is suggested that reasonable payments or reimbursements are supposed to be made by a party as reimbursement costs incurred during

<sup>94</sup> E. Sorensen, 'Interference with Judicial Process', 26 *American Criminal Law Review* (1988), p. 901

<sup>95</sup> Rule 74 of the RPE

<sup>96</sup> *Prosecutor v. Jean Pierre Bemba Gombo, Aimé Kilolo Musamba, Narcisse Arido, Jean-Jacques Mangenda Kabongo and Fidèle Babala Wandu*, Witness CAR-OTP-P-272 Transcripts, ICC-01/05-01/13-T-25-Red-ENG WT 21-10-2015 1/40 NB T, 21 October, 2015, <https://www.icc-cpi.int/iccdocs/doc/doc2198709.pdf>, last accessed on 20 April 2016.

<sup>97</sup> *Prosecutor v. Jean Pierre Bemba Gombo, Aimé Kilolo Musamba, Narcisse Arido, Jean-Jacques Mangenda Kabongo and Fidèle Babala Wandu*, Notification of the appointment of Mr Raphael Nyabirungu Mwene Songa as Legal Adviser to Witness P-0198, pursuant to Rule 74 of the Rules of Procedure and Evidence, ICC-01/05-01/13-1406 21-10-2015 1/3 NM T, 20 October, 2015, <https://www.icc-cpi.int/iccdocs/doc/doc2089839.pdf>, last accessed on 19 April 2016.

<sup>98</sup> Possibly the only exception to this is individuals within the witness protection program that are supposed to travel and meet investigators, Chapter 3 (Regulations 79-96) on Responsibilities of the Registrar Relating to victims and witnesses, Regulations of the Registry, ICC-BD/03-01-06, [https://www.icc-cpi.int/NR/rdonlyres/A57F6A7F-4C20-4C11-A61F-759338A3B5D4/140149/ICCBD\\_030106\\_English1.pdf](https://www.icc-cpi.int/NR/rdonlyres/A57F6A7F-4C20-4C11-A61F-759338A3B5D4/140149/ICCBD_030106_English1.pdf), last accessed on 17 April, 2016.



travel to interview locations and all other incidental costs.<sup>99</sup> Such reasonable reimbursement may be compared to an average earning in the home country of the witness. However, it should never be an amount that can be viewed as an inducement or a pay-off to testify before Court. There is a special category of a witness suffering substantial economic loss<sup>100</sup> as a result of testifying in the trial. This calls for an extra-ordinary allowance to be provided. Further, special witness needs such as school fees for children, help with commercial business, house maintenance have been considered as possible payments that VWU can weigh in depending on an evaluation of individual case to case basis of a witness.<sup>101</sup> It has to be observed that *lacuna in law* as regards mandate of the VWU to parties to regulate how much to be paid to a witness during investigations makes it impossible for it to advise and enforce the use of unit's same payment standards. Just as there is legal framework in place allowing the Chamber (through VWU arrangements) to regulate contacts between party and witnesses during their testimony, payments by both the defence and prosecution to witnesses during investigations need serious attention. This will preserve the integrity of the ICC justice system not to view witnesses as being influenced or induced by unreasonable sums of money. It will still be a challenge as to the definition of reasonable reimbursements since categories or factors processes for them cannot be easily closed. Witnesses in war crimes tribunal proceedings are precious commodities.<sup>102</sup> Thus any modern and progressive criminal justice system should be able to completely take care of the human good for its witnesses,<sup>103</sup> while properly balancing<sup>104</sup> the same with fairness for the accused person. It is suggested that a policy-oriented approach and legal interpretation that considers reimbursements or payments that as good and dignifying for the witnesses, fair to both sides of the trial process and appraised on a case to case basis can be deemed to be reasonable reimbursements.

<sup>99</sup> ICC policy and practice as per Witness Simo Matti Severi Väättänen, former head of the ICC's VWU listed travel, accommodation, lodging, incidental allowances , pocket money to cater for other expenses related to the stays at a specific location during testimony, attendance allowance to compensate for the time and loss of earnings during a witness testimony while away from home, see also Wakabi, W, (15 March, 2016) Defense Lawyers' Payments to Witnesses in Focus at ICC Trial, International Justice Monitor, <http://www.ijmonitor.org/2016/03/defense-lawyers-payments-to-witnesses-in-focus-at-icc-trial/>, last accessed on 16 April 2016.

<sup>100</sup> For instance a farmer who during testimony he or she is supposed to be in his farm harvesting his or her crops.

<sup>101</sup> Bemba made such payments as schools fees for witness children, truck for commercial purposes, house furniture, fence for a house of some of his witnesses,

<sup>102</sup> Wald, P, (2002) Dealing with Witnesses in War Crimes Trials: Lessons from the Yugoslavia Tribunals, 5 *Yale Human Rights and Development Law Journal*, p. 238.

<sup>103</sup> Kayuni, S, (2015) The ICC's Witness Protection Measures through the Lens of Policy-Oriented Jurisprudence, 4(2) *University College of London Journal of Law and Jurisprudence*, p.271.

<sup>104</sup> McLaughlin, C.T. (2007) Victim and Witness Measures of the International Criminal Court: A Comparative Analysis, 6(1) *The Law & Practice of International Courts and Tribunals*, pp.189-220.



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10 A person is guilty of tampering or interfering with a witness in two scenarios, if he or she  
11 knowing that the person is or is about to be called as a witness in an ongoing trial or  
12 proceedings. Thus, it must be proven that such a person must have wrongfully induced or  
13 attempted to induce a witness to either absent himself or herself from trial, or otherwise to  
14 avoid or seek to avoid appearing or testifying at an ongoing trial or proceedings.<sup>105</sup> Further,  
15 such an accused person must knowingly make any false statements or practices any fraud or  
16 deceit with intent to affect the testimony of such a witness. Elements of this particular offence  
17 include the intention to influence the witness or prospective witness, such an accused person  
18 offers, confers, or agrees to confer any benefit. It has been held elsewhere that coercing a  
19 witness to withhold any testimony information, document or thing is another form of  
20 interference as well.<sup>106</sup> Further, an accused person can be charged with the offence if he or she  
21 coerces a witness to elude legal process summoning him or her to supply evidence, absent  
22 himself from official proceedings to which he has legally been summoned.<sup>107</sup> It is submitted  
23 that categories of witness tampering or interference within the ambit of Article 70 are many  
24 and not closed. Dependent on technological advancements, creativity and craftiness of those  
25 appearing before the ICC, numerous ways may be devised for purposes of tampering with  
26 witnesses. It is therefore the duty upon decision-makers and participants within the Court to be  
27 steadfast and alert in translating policy relating to the administration of justice.<sup>108</sup> It is suggested  
28 that such decision-makers should take a policy-oriented approach<sup>109</sup> whereby dignity of  
29 witnesses, fulfilment of world community aspirations for justice, proscription of behaviour  
30 suitable to jeopardising integrity of the Court, preservation of order, certainty and integrity of  
31 judicial proceedings.<sup>110</sup> Further, participants in judicial proceedings within the ICC need to  
32 be protected corrupt influence or intimidation by unscrupulous persons while they are about to  
33 or discharging their duty to the Court and world community. It is yet to be seen how Article 70  
34 will be applicable to lawyer-client privilege scenarios. Currently the ICC is grappling with  
35 lawyers who when advising witnesses that are about to appear before the Court, might have  
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47 <sup>105</sup> *United States v. Brand*, 775 F.2d. 1460, 1465 (11<sup>th</sup> Circuit, 1985)

48 <sup>106</sup> *United States v. Partin*, 522 F.2d. 621, 641 (5<sup>th</sup> Circuit)

49 <sup>107</sup> See generally, Schleck, P., & Wright, G. 'Interference with the Judicial Process', 30 *American Criminal Law Review*, pp. 789-793

50 <sup>108</sup> M. McDougal *et. al*, 'The World Constitutive Process of Administrative Decision' 19(3) *Journal of Legal Education*, (1966-67), p. 254

51 <sup>109</sup> H.D, Lasswell, M, McDougal, Jurisprudence in Policy-Oriented Perspective, 19 *University of Florida Law Review*, (1966), p. 486

52 <sup>110</sup> *Walter Osapiri Barasa Case* (n21) para 20.  
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7 obstructed the administration of justice.<sup>111</sup> There is need to exercise discretion cautious as there  
8 is need to respect lawyer-client privilege. That notwithstanding, it is suggested that if at all a  
9 lawyer evidence points to the fact that a lawyer while advising or representing a witness went  
10 further than his legal mandate to corruptly offer bribes or facilitate bribes for purposes of  
11 defeating the course of justice, such a lawyer cannot later on plead protection from the lawyer-  
12 client privilege. Such behaviour is beyond the realm of what lawyers do for clients. Thus  
13 decision-makers at the Court will have to come up with factor processes that would enable even  
14 handedness in respecting lawyer-client privilege while fighting the obstruction of justice. It  
15 will basically go to the mens rea and actus reus of the accused persons.  
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21 Article 71 limits misconduct to Courtroom situations. Such situations include degree of control  
22 over recalcitrant witnesses, disruption of proceedings and deliberate refusal to comply with  
23 directions.<sup>112</sup> It is suggested that such a section is difficult to cover misconduct emanating from  
24 outside the Courtroom. This is contrary to predecessor *ad hoc* tribunals where the Chambers  
25 could deal with behaviour outside the Courtroom. An example is the case of *Hartmann* in the  
26 ICTY<sup>113</sup> where the accused, a former spokesperson of ICTY Prosecutor was fined 7, 000 Euros  
27 for publicly disclosing a confidential legal reasoning behind a controversial decision made by  
28 the tribunal on an ongoing trial. If at all the ICC decides to execute Article 71 for such purposes  
29 as misconduct relating to publication of reasoning behind controversial decision or exercise of  
30 discretion within the Court, cautious process needs to be undertaken by decision-makers. It is  
31 submitted that the ICC is viewed as a paradigm for democracy and human good. Thus  
32 transparency of the OTP in exercise of discretion or policy direction needs to be paramount. It  
33 is morally damaging for the ICC authority to stifle palpable public interest served by any such  
34 publication. The primary pursuit of human good in form of truth and justice should not be  
35 compromised in order to pursue other fundamental purposes or ideals. Thus such a punishment  
36 of an ICC official on the basis of a publication would be inconsonant with the Court's pursuit  
37 for justice and end of impunity. Further, sanctions provided under Article 71 are a proper  
38 mechanism by which the Trial Chamber could maintain control of proceedings.<sup>114</sup> This can as  
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47 <sup>111</sup> *Gicheru and Bett Case* (n 21)

48 <sup>112</sup> SN Ngane *The Position of Witnesses Before the International Criminal Court* (Leiden, Koninklijke Brill,  
49 2013), pp. 329 -330; see also O Triffler 'Article 71, Sanctions for Misconduct before the Court' in O Triffler  
50 (Ed.) *Commentary on the Observers Notes, Article by Article* ( Verlag Beck, 2008), pp. 1347-1360.

51 <sup>113</sup> *Prosecutor –v- Hartmann*, (IT-02-54-R77.5 A) In the Case Against Florence Hartmann (Judgment) 19 July  
52 2011, [http://www.icty.org/x/cases/contempt\\_hartmann/acjug/en/110719\\_judgement\\_hartmann.pdf](http://www.icty.org/x/cases/contempt_hartmann/acjug/en/110719_judgement_hartmann.pdf) accessed on  
53 22 October 2015.

54 <sup>114</sup> *Prosecutor –v- Thomas Lubanga Dyilo* Judgment on the appeal of the Prosecutor against the decision of Trial  
55 Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit  
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well extend to control of the conduct of the Prosecutor as recourse to sanctions enables the Court to execute tools available within the trial process to ensure the underlying obstacles to a fair trial, speedy trial and conclusion of trial on merits are adhered to. Therefore, it is submitted that a trial Chamber visited upon with a conduct that borders on deliberate refusal to comply with its orders threatens human good, *i.e.* fairness of the trial. Such Chambers should seek to bring about such party's compliance through the imposition of sanctions under Article 71.

### C. The Problem of Subpoena Testimonies

Notwithstanding the ICC offences against administration of justice, there is a serious challenge as regards enforcement. The ICC's policy and legal framework lacks the subpoena powers to seriously enforce the international criminal justice system.<sup>115</sup> Witnesses or persons that fail to follow Court's directions or offend its trial integrity are unlikely to be sanctioned pursuant to Article 71 of the Rome Statute.<sup>116</sup> It symbolises a huge weakness and biggest threat to an effective and functioning trial process at the Court.<sup>117</sup> Sluiter has observed that the omission of the subpoena powers were part of a deliberate compromise at Rome among the states against and in favour of a powerful Court.<sup>118</sup> Fair trial rights of the accused person and truth-finding processes before the Court have been gravely affected by this omission.<sup>119</sup> It is a non-derogable right for the witnesses not to appear and give testimony before the Chambers. Ngane has interpreted it as an ICC legal framework enshrining voluntary appearance principle.<sup>120</sup> The International Bar Association (IBA) has observed this voluntariness factor within the ICC witness system fails to meet expectations of potential witnesses and creates additional resource pressure and strain on the OTP's shoe-string budget.<sup>121</sup> That notwithstanding, Khan and Dixon

to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU" (AC) ICC-01/04-01/06-2582 08-10-2010 1/27 T OA18, Decision of 8 October 2010, para 60, <http://www.icc-cpi.int/iccdocs/doc/doc947768.pdf> accessed on 22 September 2015.

<sup>115</sup> Kress, C. & Prost, K, (2008) Article 93 in Triffterer, O. (Ed.) *Commentary in the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, Munich, Beck/Hart, p.1576.

<sup>116</sup> Sluiter, G, (2009) "I Beg You, Please Come Testify"——The Problematic Absence of Subpoena Powers at the ICC, 12(4) *Journal of New Criminal Law Review: In International and Interdisciplinary*, pp.590-608.

<sup>117</sup> Mazurek, A, (2008) *Prosecutor v. Thomas Lubanga Dyilo: The International Criminal Court as It Brings Its First Case to Trial*, 86 *University of Detroit Mercy Law Review*, p.535.

<sup>118</sup> Sluiter, G, (2010) *Appearance of Witnesses and unavailability of subpoena powers for the Court*, in Bellelli, R. (Ed.) *International Criminal Justice: Law and Practice from the Statute to its Review*, Surrey, Ashgate, pp. 461-466.

<sup>119</sup> Ibid

<sup>120</sup> Ngane, S, (2011) *Should States Bear Responsibility of Imposing Sanctions on Its Citizens Who as Witnesses Commit Crimes Before the ICC?* in Henham, R.J. & Findlay, M. (Eds.) *Exploring the Boundaries of International Criminal Justice*, Surrey, Ashgate Publishing, p.143.

<sup>121</sup> IBA, (July, 2013) *Witnesses before the International Criminal Court : An International Bar Association International Criminal Court Programme report on the ICC's efforts and challenges to protect, support and ensure*

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7 have argued that non-appearance of a witness is not per se an offence against the ICC  
8 administration of justice.<sup>122</sup> Concept of voluntary means no more than a formal instrument of  
9 compulsion (such as a subpoena). It however does not mean that there exists an absence of  
10 compulsion.<sup>123</sup> Principle of voluntary appearance has been confirmed by other ICC Chambers  
11 in *Lubanga*<sup>124</sup> and *Kenyan*<sup>125</sup> Cases. A states party can possibly impose sanctions on a witness  
12 for offences against administration of justice.<sup>126</sup> This is an obligation<sup>127</sup> and shared  
13 responsibility of the world community in international criminal justice. In a nutshell, ICC  
14 policy formulation and legal interpretation<sup>128</sup> on subpoenas should deem states parties as  
15 having a broader duty to comply with the ICC's requests.<sup>129</sup>  
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22 ICC Chambers has recently has attempted to interpret its subpoena powers. In the case of  
23 *Prosecutor –v- Ruto and Sang*,<sup>130</sup> the Prosecution had requested the Chamber to summon 8  
24 witnesses that were either no longer cooperating with the Prosecution or had informed the  
25 Prosecution that they were no longer willing to testify.<sup>131</sup> In considering both general  
26 international law and provisions of the Rome Statute, the Trial Chamber V(A) held that the  
27 Rome Statute States Parties did not intend to create an ICC that is 'in terms a substance, in  
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33 the rights of witnesses, IBAHRI Trust, p.16, <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=4470A96B-C4FA-457F-9854-CE8F6DA005ED>, last accessed on 17 April 2016.

34 <sup>122</sup> Khan, K, & Dixon, R, (2005) *Archibold, International Criminal Courts: Practice and Evidence*, Thomson, Sweet & Maxwell, p.138.

35 <sup>123</sup> Zahar, A, (2009) *International Court and Private Citizen*, 12(4) *New Criminal Law Review: In International and Interdisciplinary Journal*, p.587.

36 <sup>124</sup> *Prosecutor -v- Dyilo Lubanga*, Transcript of 20 May, 2011, ICC-01/04-01/06-T-355-ENG ET, p.5, para 19, <https://www.icc-cpi.int/iccdocs/doc/doc1077412.pdf>, last accessed on 13 April 2016.

37 <sup>125</sup> *Kenyan Situation*, Second Decision on Application by Nine Persons to Questioned by the Office of the Prosecutor, 31 January, 2011, ICC-01/09-39, para 20, <https://www.icc-cpi.int/iccdocs/doc/doc1011657.pdf>, last accessed on 14 April 2016.

38 <sup>126</sup> Ngane, Should States Bear Responsibility of Imposing Sanctions on Its Citizens Who as Witnesses Commit Crimes Before the ICC? (n.6), p.143

39 <sup>127</sup> See generally, Sluiter, G, (2002) *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, Antwerp, Oxford.

40 <sup>128</sup> Article 93(1)(b) of the Rome Statute

41 <sup>129</sup> Ngane, S.N, (2013) *The Position of Witnesses Before the International Criminal Court*, Leiden, Brill Nijhoff, p.262.

42 <sup>130</sup> *Prosecutor –v- William Samoei Ruto and Joshua Sang*, Decision on Prosecutor's Application for Witness Summonses and Resulting Request for State Party Cooperation, ICC-01/09-01/11-1274-Corr2 30-04-2014 1/78 NM T, 17 April, 2014, Trial Chamber V(A), <https://www.icc-cpi.int/iccdocs/doc/doc1771401.pdf>, last accessed on 13 April 2016.

43 <sup>131</sup> *Prosecutor –v- William Samoei Ruto and Joshua Sang*, Corrected and amended version of "Prosecution's request under article 64(6)(b) and article 93 to summon witnesses" (ICC-01/09-01/11-1120-Conf-Exp), Prosecution Summonses Request, ICC-01/09-01/11-1120-Red2-Corr, paras 1, 5, 62, <https://www.icc-cpi.int/iccdocs/doc/doc1694953.pdf>, last accessed on 13 April 2016; Supplementary Request, ICC-01/09-01/11-1188-Conf-Red, paras 2-3.

truth a phantom'.<sup>132</sup> Rather, they must be presumed to have created a court with every necessary competence, power, ability and capability to exercise its functions and fulfil its mandate in an effective way. These include the power to subpoena witnesses. Therefore, it is suggested in this article that ICC's entire dependence on the inclination of witness voluntary appearance would be holding the Court to the whims, witness' continued goodwill, peril and mercy of external forces. Functions and powers of the Trial Chamber include a compulsive requirement that:

*In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:*

(b) *Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;*<sup>133</sup> (Emphasis added).

These are powers accorded to the ICC to compel witnesses to appear before it,<sup>134</sup> or pursuant to Article 93(1) (b) of the Rome Statute, the Court may request a State Party to compel witnesses to appear before the Court *in Situ* in the State Party's territory or by way of video-link. Therefore, just as national criminal justice systems have provisions that enable national courts to subpoena testimonies, the ICC Chambers presiding over offences that destroy public order and shock the conscience of humanity. Thus as opposed to 'voluntary appearance principle'<sup>135</sup> enshrined in Articles 93(1)(e) and 93(7), the Rome statute grants compulsion powers to subpoena testimonies while ensuring that there is sufficient evidence, expeditious and fair trial procedures. The intention of the framers of the Rome Statute was not to deny subpoena powers to the ICC. In that connection, the Chamber found that there is unity among international law, the Rome Statute, the Constitution of Kenya and the laws of Kenya concerning its dealings with the ICC.<sup>136</sup> It was found that the Government of Kenya has an

<sup>132</sup> *Prosecutor –v- William Samoei Ruto and Joshua Sang*, Decision on Prosecutor's Application for Witness Summonses and Resulting Request for State Party Cooperation, ICC-01/09-01/11-1274-Corr2 30-04-2014 1/78 NM T, 17 April, 2014, Trial Chamber V(A), <https://www.icc-cpi.int/iccdocs/doc/doc1771401.pdf> , last accessed on 13 April 2016.

<sup>133</sup> Article 64(6)(b) of the Rome Statute; Ibid, paras 100-101.

<sup>134</sup> *Prosecutor –v- William Samoei Ruto and Joshua Sang*, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", Dated 9 October, 2014, AC, ICC-01/09-01/11-1598 09-10-2014 1/50 EK T OA7 OA8, <https://www.icc-cpi.int/iccdocs/doc/doc1847142.pdf> , last accessed on 14 April 2016.

<sup>135</sup> Ngane, S, *Supra* (note 97), p.143.

<sup>136</sup> *Prosecutor –v- William Samoei Ruto and Joshua Sang*, Decision on Prosecutor's Application for Witness Summonses and Resulting Request for State Party Cooperation, ICC-01/09-01/11-1274-Corr2 30-04-2014 1/78 NM T, 17 April, 2014, Trial Chamber V(A), paras 102-124, 174-175, <https://www.icc-cpi.int/iccdocs/doc/doc1771401.pdf> , last accessed on 13 April 2016.

obligation to cooperate fully with the Court: by serving the subpoenas to the witnesses and by assisting in compelling their attendance before the Chamber, by the use of compulsory measures as necessary.<sup>137</sup> Further, Trial Chamber V(a) directed the Registry of the Court to prepare and transmit a cooperation request to the Republic of Kenya for: (i) the service of summonses by the Government of Kenya on the eight witnesses, (ii) assistance in compelling and ensuring the eight witnesses' appearance before the Chamber by video-link or before the Chamber convened on the territory of Kenya and (iii) the Government of Kenya to make appropriate arrangements for the security of the eight witnesses until they appear before the Court.<sup>138</sup> Contrary to this, the dissenting opinion of Judge Herrera Carbuca shed more light on Article 64(6)(b). The judge held that though the Rome Statute grants the powers to the ICC to compel witness appearance pursuant to Article 64(6)(b), there is no mechanism to make an individual liable for refusing to testify.<sup>139</sup> The Rome Statute's administration of justice offences do not contemplate this kind of contempt making subpoena powers absent.<sup>140</sup> Appraising Judge Carbuca's dissent, it is suggested this is flawed reasoning. In as far as offences against the administration of justice are silent on this contemptuous conduct, legal and policy-oriented approach should point to a Court with general powers to punish any misconduct or offences during trial.<sup>141</sup> No Court would grant judges all powers except inherent jurisdiction to coordinate and manage the conduct of trials. It is argued that there exists a direct obligation for the summoned witness to the Court.<sup>142</sup> Failure to fulfil such subpoena obligations exposes one to the liability of criminal sanctions within the inherent powers of the Court.<sup>143</sup> However, it is further suggested that for purposes of avoiding any doubts, the ICC RPE should be amended in order to give room for clear policy formulation and legal interpretation for these stipulated powers.

#### D. Past Trends in Administration of Justice Offences

<sup>137</sup> *Ibid*; Judge Herrera Carbuca in his dissenting opinion disagrees with this, paras 14-20

<sup>138</sup> *Ruto Decision*, Trial Chamber V(A)

<sup>139</sup> *Prosecutor –v- William Samoei Ruto and Joshua Sang*, Dissenting Opinion of Judge Herrera Carbuca on the Decision on Prosecutor's Application for Witness Summonses and Resulting Request for State Party Cooperation, ICC-01/09-01/11-1274-Corr2 30-04-2014 1/78 NM T, 29 April, 2014, Trial Chamber V(A), paras 10-12, <https://www.icc-cpi.int/iccdocs/doc/doc1757148.pdf>, last accessed on 13 April 2016.

<sup>140</sup> *Ibid*

<sup>141</sup> ICC Regulation 29(1) (n49)

<sup>142</sup> Sluiter, G, (2009) 'I beg you please come to testify' - The Problematic absence of Subpoena Powers at the ICC, p.592

<sup>143</sup> ICC Regulation 29(1) and 29(2) (n49)

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7 It is trite that the ICC structure as regards its prosecutorial mandate couched in Articles 70 and  
8 71 of the Rome Statute, heavily weighs-in the way the Chief Prosecutor conducts himself in  
9 terms of policy considerations. Thus as a decision-maker the Chief Prosecutor should be  
10 cautious at handling policy dilemmas by not complicating legalistic mission of the Court,  
11 namely achieving justice. Decisions should be purely based on the interests of justice even if it  
12 means investigating and prosecuting the OTP team or its intermediaries. It is suggested that  
13 strategies employed by decision-makers as regards discretionary powers pursuant to offences  
14 against the administration of justice should be fair and just. It must be an interpretation of law  
15 coupled with a conflation of policy reflecting the aspirations<sup>144</sup> of the negotiators at Rome. The  
16 current conduct of the OTP seriously undermines the very foundations and legitimacy  
17 standards that the court was built on. Notwithstanding numerous allegations, criticisms about  
18 conduct that falls afoul to administration of justice offending, only two cases<sup>145</sup> have been  
19 before the Court since its inception on 1<sup>st</sup> July, 2002. Thus it is submitted that the relaxed and  
20 timid approach in effecting Articles 70 and 71 has probably seen an increase in the unfortunate  
21 conduct of, inter alia, witness tampering and interference among the ICC witnesses.<sup>146</sup> The  
22 fact that the ICC continues to open new situations, cases or investigations means that such  
23 conduct will continue cropping up unless something is done urgently. It is not a question of  
24 option for the actors and decision-makers within the Court to continuously apply scant  
25 approach to the expectations of those that carved Articles 70 and 71 into the statute. They are  
26 the duty bearers and they are expected to execute the provisions in accordance with the  
27 aspirations dreamed at Rome. Throughout the negotiating process, the question of prosecutorial  
28 authority proved a major point of dispute.<sup>147</sup> Even after the process, prosecutorial discretion

144 O. Hathaway, 'The Continuing influence of the New Haven School,' 32 *Yale Journal of International Law* (2007), p.558.

145 *Prosecutor v. Walter Osapiri Barasa*, ICC-01/09-01/13, <http://www.icc-cpi.int/iccdocs/doc/doc1650592.pdf> (last accessed on 02/05/2015); *Prosecutor v. Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido*, ICC-01/05-01/13, <http://www.icc-cpi.int/iccdocs/doc/doc1857534.pdf> accessed on 22 September 2015.

146 T. Escritt, 'Slain ICC Witness involved in Witness Tampering scheme – prosecutors,' (2015) <http://uk.reuters.com/article/2015/01/09/uk-kenya-courts-idUKKBN0K110A20150109> accessed on 22 September 2015.; Magdaleno, J. (2015) Disappearance of Key Witness Raises Concerns Over Tampering in ICC Kenya Case, <https://news.vice.com/article/disappearance-of-key-witness-raises-concerns-over-tampering-in-icc-kenya-case> accessed on 23 September 2015.

147 *See generally*, Diplomatic Conference of Plenipotentiaries on the Establishment of International Criminal Court, June 15 -July 17, 1998, Draft Statute of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/Conf.183/2/Add.1 (1998) [hereinafter "Final PrepCom Draft Statute"].

has proven to be a pinnacle for international criminal courts<sup>148</sup> judicial processes resulting in calls for rational ethical and legal consideration in decision-making.<sup>149</sup>

Numerous opportunities can be tapped from how predecessor international criminal tribunals have grappled with offences against the administration of justice. It is submitted that mostly, such experiences have been a learning curve for the tribunals. This has been due to their mandates and arena of operation. It is suggested that within these *ad hoc* and internationalized tribunals, having offences against the administration of justice within the RPE meant that such issues were not very well evident. They did not properly serve human good. For instance, in the ICTY *ad hoc* tribunal's case of *Tadic* benefitted from the overzealous defence that disregarded court's protective measures to unveil misconduct or lack of truthfulness thereof by some witnesses. It was all blamed on the general failure of the prosecution to test adequately the truthfulness of evidence or its diligence.<sup>150</sup> Apart from witness misconduct or tampering, intimidation during the *Prosecutor v. Haradinaj* Case proved problematic as fear was instilled in witnesses who wanted to step forward and testify against the accused person. The ICTY had difficulties in extracting plausible evidence from such witnesses.<sup>151</sup> This probably led to travesty of justice. Other instances before the ICTY that culminated into offences against the administration of justice included the *Lukic* Case concerning bribery to witnesses,<sup>152</sup> *Vojislav Seselj* Case<sup>153</sup> concerning flouting of protective measures through publication of witnesses information.

<sup>148</sup> See generally, M.R. Brubacher, 'Prosecutorial Discretion within the International Criminal Court,' 2(1) *Journal of International Criminal Justice* (2004), pp 71-95; L. Côté, 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law,' 3(1) *Journal of International Criminal Justice* (2005), pp.162-186; A.S. Weiner, 'Prudent Politics: The International Criminal Court, International Relations, and Prosecutorial Independence,' 12 *Washington University Global Studies Law Review* (2013), p. 545

<sup>149</sup> A. Sarvarian, 'Ethical Standards for Prosecution and Defence Counsel before International Courts: The Legacy of Nuremberg,' 10 *Journal of International Criminal Justice* (2012), pp. 423-446.

<sup>150</sup> *Prosecutor v. Tadic*, Judgement, Case No. IT-94-1-T, 7 May 1997, paras. 553-554, <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf> accessed on 20 September 2015.

<sup>151</sup> *Prosecutor v. Haradinaj, Balaj and Brahimaj*, Judgement, Case No. IT-04-84-A, 19 July 2010, paras 23-28, <http://www.icty.org/x/cases/haradinaj/acjug/en/100721.pdf> accessed on 22 September 2015.; see also *Prosecutor v. Limaj, Bala and Musliu*, Judgement, Case No. IT-03-66-T, 30 November 2005, <http://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf> accessed on 20 September 2015.; *Prosecutor v. Boskoski and Tarculovski*, Judgement, Case No. IT-04-82-T, 10 July 2008, para. 14, [http://www.icty.org/x/cases/boskoski\\_tarculovski/acdec/en/090416a.pdf](http://www.icty.org/x/cases/boskoski_tarculovski/acdec/en/090416a.pdf) accessed on 22 September 2015.

<sup>152</sup> *Prosecutor v. Rasic*, Judgement, Case No. IT-98-32/1-R77.2-A, 16 November 2012, [http://www.icty.org/x/cases/contempt\\_rasic/acjug/en/121116\\_judgement.pdf](http://www.icty.org/x/cases/contempt_rasic/acjug/en/121116_judgement.pdf) accessed on 22 September 2015.

<sup>153</sup> *Prosecutor v. Seselj*, Public Version of the Judgement Issued 30 May 2013, Case No. IT-03-67-R77.4-A, 20 May 2013, [http://www.icty.org/x/cases/contempt\\_seselj3/acjug/en/130530\\_judgement.pdf](http://www.icty.org/x/cases/contempt_seselj3/acjug/en/130530_judgement.pdf) accessed on 22 September 2015.



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7 The ICTR has had its own share of allegations of offences against the administration of justice.  
8 Contrary to the ICTY, this has not been so prominent. The case of *Prosecutor v. Bizimungu,*  
9 *Mugenzi, Bikamumpaka and Mugiraneza* had the defence raise serious allegations of the  
10 Rwandan government tampering with its witnesses. It was alleged that there was a ploy to  
11 dissuade witnesses from testifying in favour of the defendants through harassment and  
12 evidence fabrications.<sup>154</sup> Further, there were allegations that the Rwandan government agents  
13 heavily influenced what witnesses were to say before the Tribunal through threats and other  
14 methods that instilled fear and trepidation among the witnesses.<sup>155</sup> It is submitted that the case  
15 to case basis approach to analysis of any contempt of court or tampering allegations was a  
16 brilliant approach by the ICTR.<sup>156</sup> That notwithstanding, holding that the trial process was fair  
17 just because allegations of evidence fabrications and witnesses intimidation had not stopped  
18 the defence from having access to the witnesses is flawed.<sup>157</sup> Thus it is submitted that witness  
19 tampering or intimidation comes in all forms. There are times when a witness can be tampered  
20 with or intimidated or even coached to fabricate a story, collusion and yet avail himself or  
21 herself for the defence with an inept story. Further to this, there are times when even mere  
22 access to information leading to proof that there exists evidence fabrication, witness  
23 intimidation and collusion has been denied to the defence.<sup>158</sup> It is therefore flawed to conclude  
24 that access to intimidated witnesses by the defence equals fair trial. If the process is faulty then  
25 the resultant effects will not be for human good. There will not be any fair trial.  
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35 The hybrid courts such as the SCSL had its own mishaps with offences against the  
36 administration of justice. The Independent Counsel had brought proceedings against *Brima*  
37 *Samura* for disclosure of an identity of one of the protected witnesses to one of the wives of  
38 the defendants leading to serious allegations of post-testimony intimidation. The question of  
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44 <sup>154</sup> *Prosecutor v. Bizimungu, Mugenzi, Bikamumpaka and Mugiraneza*, Judgement, Case No. ICTR-99-50-T, 30  
45 September 2011, paras. 108–110, <http://www.unict.org/sites/unict.org/files/case-documents/ict-99-50-trial-judgements/en/110930.pdf> accessed on 21 September 2015.

46 <sup>155</sup> *Prosecutor v. Simba*, Judgement, Case No. ICTR-01-76-T, 13 December 2005, para 41,  
47 <https://www1.umn.edu/humanrts/instree/ICTR/SIMBA ICTR-01-76/SIMBA ICTR-01-76-T.pdf> accessed on 22  
48 September 2015.

49 <sup>156</sup> *Mugiraneza* Defence Motion pertaining to allegations of contempt resulting from alleged defence witness  
50 harassment. See Confidential Decision on Request to Initiate Contempt Proceedings (TC), 19<sup>th</sup> August, 2011.

51 <sup>157</sup> *Bizimungu* Case, *Op. Cit.*, paras 108-110.

52 <sup>158</sup> *Justin Mugenzi and Prosper Mugaraneza v. Prosecutor*, ICTR -99-50A, (Appeal Chamber), Decision on  
53 Jacques Mungwarere's Motion for Access to Confidential Material, Decision of 24<sup>th</sup> May, 2012,  
54 [http://www.worldcourts.com/ict/eng/decisions/2012.05.24\\_Mugenzi\\_v\\_Prosecutor.pdf](http://www.worldcourts.com/ict/eng/decisions/2012.05.24_Mugenzi_v_Prosecutor.pdf) accessed on 22nd  
55 September 2015.

whether the accused person had relevant mens rea played a crucial role to the proceedings.<sup>159</sup> Disclosure of confidential information as an offence resurfaced again in *Taylor Case*. On an inadvertent disclosure of protected witnesses' details by the defence, Prosecution brought contempt of court proceedings against defence lawyers for violations of Rules 77(A) (ii) and 77(B) of the SCSL RPE and misconduct pursuant to Rule 46 of the same RPE.<sup>160</sup> In arguing its case, the prosecution averred that it was the duty of all actors before court to act with competence, honesty, skill and professionalism that would preserve the integrity of the court process and not bring the administration of justice into disrepute.<sup>161</sup> Thus in considering such offences against the administration of justice, mens rea plays a crucial role in decision-making. Without it is like turning such trials into strict liability offences.<sup>162</sup> It is submitted that such terms as knowingly and wilfully are conjunctive in nature. Offence allegations that stem from inadvertent actions are highly unlikely to meet the mens rea threshold of knowing and wilful interference with administration of justice.<sup>163</sup> Thus pattern of conduct or behaviour should be that which is tantamount to evidence that is probative of intent to knowingly and wilfully interfere with the administration of justice.<sup>164</sup> Dissection of the animus of the accused during the commission of the offence will readily help in considering whether such a person conducted himself or herself inadvertently or it was a knowing and wilful act or omission.<sup>165</sup>

Another court that has been dodged with offences against administration of justice is the STL. It is suggested that the sensitivity and nature of how the court came into effect has heavily contributed to the performance of the court. Thus probably leaking of details of prosecution witnesses has had its toll on the court.<sup>166</sup> Considering the conflict of interest likely to arise

<sup>159</sup> *Independent Counsel v. Brima, Samura* Judgment in Contempt Proceedings, SCSL-2005-01, 26 October 2005, <http://www.rscsl.org/Documents/Decisions/Contempt/2005-01/18/SCSL-05-01-18.pdf> accessed on 22 September 2015.; see also *Independent Counsel v. Bangura, Kargbo, Kanu and Kamara*, Judgment in Contempt Proceedings, SCSL-2011-2-T, <http://www.rscsl.org/Documents/Decisions/Contempt/2011-02/024/SCSL-11-02-PT-024.pdf> accessed on 22 September 2015.

<sup>160</sup> *In the Matter of Contempt Proceedings Arising from the Case of The Prosecutor v. Charles Ghankay Taylor*, (TC II), SCSL-12-01-T, Judgment in Contempt Proceedings, Decision of 19<sup>th</sup> October, 2012, <http://www.rscsl.org/Documents/Decisions/Contempt/2012-01/SCSL-12-01-T-012.PDF> accessed on 20 September 2015.

<sup>161</sup> *Ibid*, paras 8-11.

<sup>162</sup> *Charles Taylor Case*, paras 37-39.

<sup>163</sup> *Prosecutor v. Nshogoza*, ICTR-07-91-T, Judgment, 7<sup>th</sup> July, 2009, para 176, [http://www.worldcourts.com/ict/eng/decisions/2009.07.07\\_Prosecutor\\_v\\_Nshogoza.pdf](http://www.worldcourts.com/ict/eng/decisions/2009.07.07_Prosecutor_v_Nshogoza.pdf) accessed on 21 September 2015.

<sup>164</sup> *Charles Taylor case*, para 44

<sup>165</sup> *Ibid*, paras 39-45

<sup>166</sup> Tribunal to Launch Investigation in Alleged Witness Intimidation', STL press release, 29 April 2013, <http://www.stl-tsl.org/en/news-and-press/press-releases/2278-29-04-2013-tribunal-to-launch-investigation-in-alleged-witness-intimidation> accessed on 21 September 2015.

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7 within the office of the Prosecutor, overburdening the office of prosecutor and pursuant to the  
8 principle justice must be seen to be done, the RPE allowed a person other than the prosecutor  
9 to be appointed as amicus curiae to investigate such an offence against administration of  
10 justice.<sup>167</sup> It is thus submitted that the recognition of likely conflict of interest arising from the  
11 very office of the prosecutor as regards offences against the administration of justice serves  
12 optimum order within the court. The decision-making process in as far as it is not just cannot avail  
13 a result that will be seen in the public eye as justice. Thus mandating prosecution to investigate  
14 an offence emanating from administration of justice is faulty. Legal and policy considerations  
15 should point towards attainment of independence in this process.  
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21 As regards subpoena powers, past trends of the internationalized tribunals such as the ICTY  
22 and ICTR have demonstrated that courts were empowered to issue subpoenas to witnesses for  
23 purposes of an investigation, or preparation or testimony during trial. Such subpoena powers  
24 were being issued by the Trial Chamber when it is necessary for the purposes of an  
25 investigation or for the preparation or conduct of the trial.<sup>168</sup> Therefore, any witness was liable  
26 to direct summons and subpoena for purposes or testimony before the tribunals. Failure to  
27 adhere to such summons and subpoena was deemed contemptuous misconduct of knowingly  
28 and wilfully interfering with the tribunals' administration of justice with fine or imprisonment  
29 sanctions as a resultant effect.<sup>169</sup> In terms of cooperation, the UN backed tribunals thrived on  
30 the backdrop of primacy and cooperation of national jurisdictions<sup>170</sup> as opposed to the Rome  
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38 <sup>167</sup> *Prosecutor v. Salim Jamil Ayyash, Mustfa Amine Badreddine, Hussein Hassan Oneissi, Assad Hassan Sabra*,  
39 Public Redacted Version of Decision on Allegations of Contempt, STL-11-01, 29<sup>th</sup> April, 2013, (PT),  
40 [http://www.stl-tsl.org/en/the-cases/stl-11-01/filings/stl1101-key-filings/2277-f0021\\_r60bis](http://www.stl-tsl.org/en/the-cases/stl-11-01/filings/stl1101-key-filings/2277-f0021_r60bis) accessed on 22  
September 2015.

41 <sup>168</sup> Article 19(2) of the Statute of the ICTY; Article 18(2) of the Statute of the ICTR; Rule 54 of the ICTY RPE;  
42 Rule 54 of the ICTR RPE; see also tribunal jurisprudence in *Prosecutor –v- Radovan Karadzic*, IT-95-5/18-T,  
43 Decision on Accused's Motion to Subpoena Zdravko Tolimir, (9 May 2013), TC,  
44 [www.icty.org/x/cases/karadzic/tdec/en/130509.pdf](http://www.icty.org/x/cases/karadzic/tdec/en/130509.pdf), last accessed on 16 April 2016 ; *Prosecutor –v- Radovan*  
45 *Karadzic*, IT-95-5/18-AR73.11, Decision on Appeal Against The Decision on the Accused's Motion to Subpoena  
46 Zdra Vko Tolimir, AC , 13 November 2013, <http://www.icty.org/x/cases/karadzic/acdec/en/131113.pdf>, last  
47 accessed on 16 April 2016; *Prosecutor –v- Halilovic*, , IT-0 1-48-AR73, Decision on the Issuance of Subpoenas,  
48 (21 June 2004), AC, para 5, [www.icty.org/x/cases/halilovic/acdec/en/040621.htm](http://www.icty.org/x/cases/halilovic/acdec/en/040621.htm) , last accessed on 14 April 2016;  
49 *Prosecutor v Krstic*, IT-98-33-A. Decision on Application for Subpoenas, (1 July,2003), AC, para 10,  
50 [www.icty.org/x/cases/krstic/acdec/en/030701.htm](http://www.icty.org/x/cases/krstic/acdec/en/030701.htm), last accessed on 15 April 2016; There is also ICTR case law  
51 namely, *Prosecutor – v - Kanyarukiga*, ICTR-2002-78-R11bis, Decision on Prosecutor's Request for Referral  
52 to the Republic of Rwanda, (6 June 2008), TC, <http://www.ictcaselaw.org/docs/20080606-dco-0278-01-en.pdf>, last  
53 accessed on 14 April 2016 ; *Prosecutor -v - Kanyarukiga*, ICTR-2002-78-R11bis, Decision on the Prosecution's  
54 Appeal against Decision on Referral under Rule 11bis, (30 October 2008), AC,  
55 <http://www.ictcaselaw.org/docs/20081030-dco-0278-01-en.pdf>, last accessed on 14 April 2016.

56 <sup>169</sup> See Rules 77(A)(iii) and 77(G) of ICTY Rules; Rules 77(A)(iii) and 77(G) of ICTR Rules

57 <sup>170</sup> Article 9(2) of the ICTY Statute; Article 8(2) of the ICTR Statute

Statute legal regime that is only complementary to the national systems.<sup>171</sup> Notwithstanding this, Brouwer has argued that although tribunals have measures at their disposal to sanction individuals breaching protection orders, the question remains as to how big the problem of witness interference really is and how to address the issue adequately.<sup>172</sup>

#### **E. Future Trends Projections and Policy Alternatives**

The investigations pursuant to Articles 70 and 71 are a special category. Overall initiation of an investigation espoused in Article 53 and any other rules thereunder are not applicable.<sup>173</sup> The Pre-trial Chamber may in its discretion make any of the determinations set forth in pursuant to conformation of charges on the basis of written submissions, without hearing, unless the interests of justice otherwise require.<sup>174</sup> It is suggested that the experience of international criminal proceedings has proven that it is much easier for the prosecution to gather incriminating evidence than it is for the defence to collect exculpatory material.<sup>175</sup> It is further suggested that such discretion must at all times be exercised sparingly. This is so because charges against administration of justice are criminal in nature and have the potential of restricting liberty of the accused person. Unless the same has been waived by the accused person, confirming charges based on written submissions and without a hearing is an affront to fair trial, procedurally flawed and a travesty of justice. It is within the rights of the accused person<sup>176</sup> and an indication of a progressive criminal procedural process for an accused person to be accorded the opportunity through himself or his counsel to object to the charges, challenge the evidence presented by the Prosecutor and present own evidence. A Trial Chamber may in its discretion order that there be a joinder of charges under Article 70 with charges under Articles 5 to 8.<sup>177</sup>

<sup>171</sup> *Prosecutor –v- William Samoei Ruto and Joshua Sang*, Dissenting Opinion of Judge Herrera Carbuccion on the Decision on Prosecutor’s Application for Witness Summonses and Resulting Request for State Party Cooperation, ICC-01/09-01/11-1274-Corr2 30-04-2014 1/78 NM T, 29 April, 2014, Trial Chamber V(A), paras 10-12, <https://www.icc-cpi.int/iccdocs/doc/doc1757148.pdf>, last accessed on 16 April 2016.

<sup>172</sup> Brouwer, A.M, (2015) *The Problem of Witness Interference before International Criminal Tribunals*, 15(4) *International Criminal Law Review*, pp.700-732.

<sup>173</sup> Rule 165(2) of the ICC RPE

<sup>174</sup> Rule 165(3) of the ICC RPE

<sup>175</sup> S. Swoboda, ‘ICC Disclosure Regime - A Defence Perspective,’ 19 *Criminal Law Forum* (2008), p. 450.

<sup>176</sup> Rule 165(3) of the ICC RPE

<sup>177</sup> Rule 165(4) of the ICC RPE

A further analysis of prosecutorial discretion on the overall powers of the Chief Prosecutor points to the sole investigatory and prosecutorial powers under Article 70 of the Rome Statute bestowed on the OTP. Thus only the Chief Prosecutor who can legally initiate investigations related to these offences against administration of justice.<sup>178</sup> The framers deliberately accorded discretion to the Chief Prosecutor to initiate and conduct investigations on the basis of information communicated by the Chamber or any other reliable source.<sup>179</sup> It has been argued by scholars that prosecutorial discretion that is so unclear as regards its legality, has the likely result of being chaotic.<sup>180</sup> It is suggested that this is especially so when the existing rules do not clearly clarify whom to investigate and indict. The Rome Statute's offences against the administration of justice mirror this serious challenge. Thus it has been argued that it falls within the realm or purview of the Prosecutor to develop ex ante rules or guidelines that mirror quality of law.<sup>181</sup> Where the Prosecutor falls short of this, the judges are likely to step in and direct or guide the Prosecutor through their interpretation of the Rome Statute.<sup>182</sup> Therefore, to the proponents of this view, the inherently political nature of the ICC's work is self-defeating in itself. The vexing question would be whether such prosecutorial discretion should not be viewed as a problem to be solved but a reason to reject and oppose the Court wholesale?<sup>183</sup> It has been argued that poor drafting, mainly premised within what has been described as incomplete work of the Preparatory Committee. The Committee has been accused of not producing basic text or basic proposals that could have enabled smooth negotiations at the diplomatic conference.<sup>184</sup> It is submitted that far as this is a plausible argument, it is flawed on so many levels. As a multi-national diplomatic conference per se, there were bound to be differences. There were nations that had different legal systems, different legal and historical cultures, some emanating from impunity, others not. Huge differences were bound to crop up and they cannot be solely blamed on the noble and commendable work that the Preparatory Committee had for so many years strenuously prepared. The pitfalls of prosecutorial discretion are already glaring in the face of the court's adherents. So far justice has not been seen to be done. All decision-making and processes as regards administration of justice offences mirror

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<sup>178</sup> Rule 165 of the ICC RPE

<sup>179</sup> Rule 165(1) of the ICC RPE

<sup>180</sup> H. Olosolo, 'The Prosecutor of the ICC before the initiation of investigations: A quasi-judicial or political body?' 3 *International Criminal Law Review* (2003), p.87.

<sup>181</sup> A.M, Danner 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court', 97 *American Journal of International Law* (2003), p.510.

<sup>182</sup> *Ibid*

<sup>183</sup> Greenwalt, *Op. Cit.*, p. 587

<sup>184</sup> S. Rosenne, 'Poor Drafting and Imperfect Organization: Flaws to Overcome in the Rome Statute', 41 *Virginia Journal of International Law* (2000-2001), pp.166 -167.

disregard for even-handedness, aspirations of world community values and optimum order. Contrary to the OTP pursuing its noble duty of serving all actors in its decision-making process, its interpretation of offences against administration of justice and rules thereto mirrors narcissistic attitude. The OTP should strive to have investigations and prosecutions that focus on the OTP staff itself, its intermediaries<sup>185</sup> and the defence. There should never be sacred cows. It is suggested that the OTP conduct and interpretation of the law so far in restraining from prosecutions and investigations against its own staff and intermediaries is a clear indication of conflict of interest fears such offices need to guard themselves against. It is suggested that at times in desperate attempts to strengthen its own case, OTP staff or even its intermediaries may go an extra-mile and engage in misconduct that is likely to be contrary to Articles 70 and 71 of the Rome Statute. Numerous times there have been reports of misconduct allegations against intermediaries who promise victims and witnesses huge amounts of reparations at trial if they bring exaggerated testimony that will lead to conviction of alleged perpetrators.<sup>186</sup> Just because they are OTP staff or OTP connected is no blank-cheque for such actors to engage in the same and escape the pangs or trappings of investigations and prosecutions. Possibly, the framing of the Rome Statute and the ICC RPE according the benefit of doubt on the OTP may have been in good faith, an expectation that the Chief Prosecutor will in the interests of justice only postulate the cherished goals, dreams and aspirations that the ICC represents. So far no prosecutions have been brought against the OTP staff or the intermediaries for allegedly assisting witnesses or victims fabricate false testimony. Not even a single investigation has ever been announced to that effect. It is only those acting for the defence that have been brought to trial. On the other hand, reluctance of the OTP not to prosecute its own staff or intermediaries may reflect fear of shooting itself in the foot and such prosecutions have a potential or future intermediaries being reluctant to cooperate with the court. The *Lubanga* Case is a good example of the OTP engaging an independent consultant instead of actually investigating the misconduct allegations.<sup>187</sup> Further, pursuant to the report by the said consultant, decided not to pursue further investigations into alleged misconduct by intermediaries.<sup>188</sup>

<sup>185</sup> Persons that the OTP hires to help on the ground with investigations and contact of potential witnesses.

<sup>186</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision of 31<sup>st</sup> May, 2010, para 25, <http://www.icc-cpi.int/iccdocs/doc/doc881407.pdf> accessed on 22 September 2015.

<sup>187</sup> *Prosecutor v. Thomas Dyilo Lubanga*, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, Decision of 14 March, 2012, para 483, <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf> accessed on 22 September 2015.

<sup>188</sup> *Prosecutor v. Thomas Dyilo Lubanga*, Appeal Chamber, Prosecution Response to Requête de la Défense de M. Lubanga aux fins de communication d'éléments de preuve recueillis par le Procureur dans le cadre des

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9 It is likely that this pitfall within the prosecutorial discretion like many others within the Rome  
10 Statute, was a result of the negotiating maze that the delegates at Rome needed to muster. There  
11 were numerous disparities in languages, legal approaches and drafting techniques among the  
12 various working groups.<sup>189</sup> Being an internationally negotiated instrument, the statute is not a  
13 perfect instrument.<sup>190</sup> Thus Articles 70 and 71 mirror such uneasy technical solution, awkward  
14 formulation and difficult compromise that possibly satisfied no one. It is a product of  
15 harmonization of divergent and diametrically opposed national criminal laws and  
16 procedures.<sup>191</sup> That notwithstanding, it can be argued that in order for Articles 70 and 71 to be  
17 effective, there is need for a balanced approach furnished with enough strength to ensure that  
18 there is operative functioning of the Court and sufficient safeguard for broad support from all  
19 actors in the administration of justice. Decision-makers within the Chambers should be able to  
20 censure and control non-compliance from OTP.<sup>192</sup> It is suggested that possibly an *amicus*  
21 *curiae* or independent counsel as an office or appointed by the Chambers is the likely office  
22 that can bring to bear the views and aspirations of the delegates that converged at Rome. Thus  
23 persons other than the Chief Prosecutor or the OTP should investigate and prosecute all  
24 offences against the administration of justice. Not only will this avert conflict of interest within  
25 the OTP, it will also postulate a human good namely, the maxim justice must be seen to be  
26 done. OTP is unable to either investigate or guard itself and someone needs to do that noble  
27 and special role. Further, the OTP is already an office operating on shoe-string budget<sup>193</sup>,  
28 burdening it with investigations against administration of justice seems an overload.<sup>194</sup> Such  
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42 enquêtes conduites en vertu de l'Article 70, ICC-01/04-01/06, Decision of 25<sup>th</sup> March, 2014, para 9,  
43 <http://www.icc-cpi.int/iccdocs/doc/doc1753007.pdf> accessed on 22 September 2015.

44 <sup>189</sup> C. Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court,' 32  
45 *Cornell International Law Journal* (1999), pp. 451-452.

46 <sup>190</sup> Editors in Chief, 'The Rome Conference on an International Criminal Court: The Negotiating Process,' 93  
47 *American Journal of International Law* (1999) p. 2-3.

48 <sup>191</sup> <http://legal.un.org/icc/statute/iccq&a.htm> accessed on 20 September 2015.

49 <sup>192</sup> M.S. Jaques *et. al*, 'The OTP –v- Thomas Lubanga Dyilo: the Challenges of using "intermediaries" in the  
50 International Criminal Court, *Humanitarian Law Perspectives*, p. 9.

51 <sup>193</sup> J. O'Donohue, 'The 2005 Budget of the International Criminal Court: Contingency, Insufficient Funding in  
52 Key Areas and the Recurring Question of the Independence of the Prosecutor,' 18(3) *Leiden Journal of  
53 International Law* (2005), pp. 591-603; *see also* J. O'Donohue, 'Financing the International Criminal Court,'  
54 13(1) *International Criminal Law Review* (2013), pp.269-296

55 <sup>194</sup> D. Groome, 'No Witness, No Case: An Assessment of the Conduct and Quality of ICC Investigations,' 3(1)  
56 *Penn State Journal of Law & International Affairs* (2014), pp. 3-4.

an overload is a multiplicity of responsibilities on an already laden office<sup>195</sup> with no proper code of conduct.<sup>196</sup>

Apart from establishing additional criminal offences, Articles 70 and 71 establish a procedure for exercise of jurisdiction. Thus it is argued that in the absence of political will from cooperating states parties or third party states, there is likely occurrence of competing jurisdictional primacy. Further, it will be such a huge challenge for a state party categorized as an unwilling and unable state is likely not to cooperate with the court.<sup>197</sup> ICC RPE rules 162-164 underscore the sensitivity and complex nature of such jurisdictional primacy. Usually when it comes to competing jurisdictional primacy regard will go to political will,<sup>198</sup> procedural rights availability, and likelihood of extradition procedure being effective and expeditious, admissibility of evidence procedures.<sup>199</sup> Thus it is suggested that it will solely depend on how the ICC negotiates with the states parties or third party states as regards investigations, transmission of witnesses and extradition of accused persons. The ICC needs to take a deliberate effort that will achieve ultimate cooperation and avoid lengthy and bureaucratic mutual legal assistance processes.

ICC skills and enlightenment<sup>200</sup> in effectively making or competently observing and analysing key decisions as regards offences against administration of justice should focus on common interests or value preferences<sup>201</sup> that postulate the applicable standard of evidence sufficiency for establishing the alleged substantial grounds charged.<sup>202</sup> It has been argued that the

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<sup>195</sup> M.M. El Zeidy, 'The Gravity Threshold Under the Statute of the International Criminal Court,' 19(1) *Criminal Law Forum* (2008) pp.35-57.

<sup>196</sup> M. Markovic 'The ICC Prosecutor's Missing Code of Conduct,' 47(1) *Texas International Law Journal* (2011)pp. 202-235.

<sup>197</sup> Cryer, (n 2) pp. 201-203.

<sup>198</sup> S. Kayuni 'Some Thoughts on Jurisdictional Primacy and the Fight Against Cross-Jurisdictional Criminality,' 52 *International Association of Prosecutors (IAP) Newsletter* (2011) pp. 17-20, <http://www.iap-association.org/News> accessed on 19 September 2015.

<sup>199</sup> C. Warbrick, & K. Brookson-Morris 'Conflicts of Criminal Jurisdiction,' 56 *International & Comparative Law Quarterly* (2007) p.659.

<sup>200</sup> M. McDougal & H. Lasswell 'Jurisprudence in Policy-Oriented Perspective,' 19 *University of Florida Law Review* (1967), p. 490.

<sup>201</sup> *Ibid*, pp. 500-501.

<sup>202</sup> *Prosecutor v. Jean Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/13-749 11-11-2014 11/55 EO PT, (PT I) Decision of 11<sup>th</sup> November, 2014, para 25, <http://www.icc-cpi.int/iccdocs/doc/doc1857534.pdf> accessed on 22 September 2015.



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7 evidential threshold<sup>203</sup> must be met or satisfied.<sup>204</sup> That notwithstanding, it is not only about  
8 ICC jurisprudence<sup>205</sup> but prudence as well namely, a thoroughly satisfactory case that the OTP  
9 has sufficiently strong allegations for purposes of trial.<sup>206</sup> On his or her observational  
10 standpoint and tapping from his or her bases of power, such Prosecutor must aver before court  
11 concrete and tangible proof about the alleged offences.<sup>207</sup> Offences above have in some ways  
12 defences that can be raised dependent on the circumstances of the each case. Thus regardless,  
13 it is submitted that lawyers or attorneys role as defence team do not insulate them from criminal  
14 consequences of their corruptly or interfering motives or actions. General defences such as  
15 lawyer-client privilege have negligible degree of success. Thus it is suggested that pursuant to  
16 Article 70 or 71, the Chamber in receiving evidence or explanation from a lawyer who is  
17 accused and part of defence team, should be live and vigilant in discerning the ulterior motive  
18 that led to the lawyer conducting himself or herself as alleged. That is the only way the  
19 Chambers can accord itself the opportunity of drawing contradictory inferences. If the  
20 allegation is within the misconduct offences, there is need for a factual or legal basis  
21 establishment.<sup>208</sup> Probably the vexing question should be whether or not the purported defence  
22 team member intended to tamper or interfere with the administration of justice. Thus it is  
23 suggested that defence need to concentrate on impeaching the probative value of prosecution  
24 evidence to the extent that the alleged false testimony could not have impeded the Chamber's  
25 inquiry into appreciating the case before it.  
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36 <sup>203</sup> *Prosecutor –v- Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-074 (AC), Judgment on the appeal of the  
37 Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan  
38 Ahmad Al Bashir, Decision of 3<sup>rd</sup> February, 2010, para 30, [http://www.legal-  
tools.org/uploads/tx\\_ltpdb/doc817795\\_02.pdf](http://www.legal-tools.org/uploads/tx_ltpdb/doc817795_02.pdf) accessed on 21 September 2015.)

39 <sup>204</sup> *Prosecutor v. Francis Muthaura, Uhuru Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation  
40 of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, , ICC-01/09-02/11-382-Red, (PT II) Decision  
41 of 23 January 2012, para. 52, , [http://www.legal-tools.org/uploads/tx\\_ltpdb/doc1314543\\_01.pdf](http://www.legal-tools.org/uploads/tx_ltpdb/doc1314543_01.pdf) accessed on 22  
42 September 2015.

43 <sup>205</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-  
44 01/06-803-tENG, (PT I) para. 39, [http://www.legal-tools.org/uploads/tx\\_ltpdb/doc266175\\_02.pdf](http://www.legal-tools.org/uploads/tx_ltpdb/doc266175_02.pdf) accessed on 21  
45 September 2015.

46 <sup>206</sup> *Prosecutor v. Laurent Gbagbo*, Decision on the confirmation of charges against Laurent Gbagbo, ICC-02/11-  
47 01/11-656-Red (PT I), Decision of 12<sup>th</sup> June, 2014, para. 19, [http://www.legal-  
tools.org/uploads/tx\\_ltpdb/doc1783399\\_01.pdf](http://www.legal-tools.org/uploads/tx_ltpdb/doc1783399_01.pdf) accessed on 22 September 2015.

48 <sup>207</sup> *Prosecutor v. Bosco Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the  
49 Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309 (PT II), Decision of 9<sup>th</sup> June, 2014,  
50 para. 9, [http://www.legal-  
tools.org/uploads/tx\\_ltpdb/Decision\\_Pursuant\\_to\\_Article\\_61\\_7\\_a\\_and\\_b\\_of\\_the\\_Rome\\_Statute\\_on\\_the\\_Charges\\_of\\_the\\_Prosecutor\\_Against\\_Bosco\\_Ntaganda\\_01.PDF](http://www.legal-tools.org/uploads/tx_ltpdb/Decision_Pursuant_to_Article_61_7_a_and_b_of_the_Rome_Statute_on_the_Charges_of_the_Prosecutor_Against_Bosco_Ntaganda_01.PDF) accessed on 21 September 2015.

51 <sup>208</sup> *Prosecutor –v- Callixte Mbarushimana*, Decision on the Defence request to consider sanctions for Misconduct,  
52 ICC-01/04-01/10-259 30-06-2011 2/4 EO PT, Decision of 30 June 2011,  
53 [http://www.worldcourts.com/icc/eng/decisions/2011.06.30\\_Prosecutor\\_v\\_Mbarushimana.pdf](http://www.worldcourts.com/icc/eng/decisions/2011.06.30_Prosecutor_v_Mbarushimana.pdf) accessed on 21  
54 September 2015.

## F. Conclusion

It has been argued that the vote to adopt the Rome Statute was a historical moment and breakthrough raising expectations of the world community for an unequivocal aspiration to end impunity and grave violations of human rights.<sup>209</sup> It can be described as a serious attempt by the international community to accord dignity to humanity. In order to afford this, there was need to protect the integrity of the Court's juridical proceedings through the creation of an offence against witness tampering or interference.<sup>210</sup> That notwithstanding, a closer scrutiny of the Rome Statute unveils a maze of legal technicalities and insufficiencies as regards guarding against the offending the administration of justice. It is probably a consequence of what some scholars have described as a product of a spirit of compromise during the diplomatic negotiations at Rome.<sup>211</sup> A revolution of some sort.<sup>212</sup> That notwithstanding, the problematic question about interference with the administration of justice is becoming a reality for the ICC thus requiring urgent and adequate attention.<sup>213</sup>

Particular decisions made as regards the offences against the administration of justice should be appraised by looking at the degree of contribution to the achievement of a public order of human dignity.<sup>214</sup> It will be such a mammoth task for the whichever ICC Judge preside over the very first full trial on the offences against administration of justice offences. With no procedural practice and precedence and ICC jurisprudence to look up to, it is likely to be a fascinating challenge<sup>215</sup> and a comparative criminal procedure labyrinth. The centrality and long term effects of offences against the administration of justice leaves the ICC decision-makers with only one option, namely pro-active and supersonic speed as regards investigations and prosecutions into alleged offences. Following the STL model, it is suggested that an independent Counsel appointed by the Chamber would make the process more credible than

<sup>209</sup> K. Ambos 'General Principles of Criminal Law in the Rome Statute,' 10 *Criminal Law Forum* (1999) p. 1.

<sup>210</sup> Article 70 (1) (c) of the Rome Statute.

<sup>211</sup> Ambos (n 117) p. 1

<sup>212</sup> A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections,' 10(1) *European Journal of International Law*, (1999) p. 145.

<sup>213</sup> Anne-Marie de Brouwer, 'The Problem of Witness Interference Before International Criminal Tribunals,' 15(4) *International Criminal Law Review* (2015), pp. 700-732.

<sup>214</sup> S. Wiessner 'Law as a Means to a Public Order of Human Dignity: The Jurisprudence of Michael Reisman,' 34 *Yale Journal of International Law* (2009), p. 525.

<sup>215</sup> C. Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise,' 1 *Journal of International Criminal Justice* (2003) p. 617.

the OTP led prosecutions or prosecutorial monopoly.<sup>216</sup> The end of the law is its aspiration to achieve human dignity. Therefore, its legitimacy is partly a function of whether it passes the test of consistency with community values. Thus this appointment is likely to competently represent the world community values agreed at Rome and postulate justice goals by considering a case to case basis approach to indictment decision-making. In a balanced approach, it is likely to proficiently sift through gathered evidence bearing in mind the probative value and relevance of mens rea of the alleged offenders.

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<sup>216</sup> Hieramente, M, Muller, P, Ferguson, E, (2014) Barasa, Bribery and Beyond: Offences against the Administration of Justice at the International Criminal Court, 14(6) International Criminal Law Review, pp. 1123-1149.